

University of Pennsylvania Carey Law School

Penn Law: Legal Scholarship Repository

Faculty Scholarship at Penn Law

1997

The Unitary Executive During the First Half-Century

Steven G. Calabresi

Northwestern University School of Law

Christopher S. Yoo

University of Pennsylvania Carey Law School

Follow this and additional works at: https://scholarship.law.upenn.edu/faculty_scholarship



Part of the [Administrative Law Commons](#), [American Politics Commons](#), [American Studies Commons](#), [Constitutional Law Commons](#), [Law and Politics Commons](#), [Leadership Studies Commons](#), [Legal History Commons](#), [President/Executive Department Commons](#), and the [Public Affairs, Public Policy and Public Administration Commons](#)

Repository Citation

Calabresi, Steven G. and Yoo, Christopher S., "The Unitary Executive During the First Half-Century" (1997). *Faculty Scholarship at Penn Law*. 718.

https://scholarship.law.upenn.edu/faculty_scholarship/718

This Article is brought to you for free and open access by Penn Law: Legal Scholarship Repository. It has been accepted for inclusion in Faculty Scholarship at Penn Law by an authorized administrator of Penn Law: Legal Scholarship Repository. For more information, please contact PennlawIR@law.upenn.edu.

THE UNITARY EXECUTIVE DURING THE FIRST HALF-CENTURY

Steven G. Calabresi & Christopher S. Yoo[†]

| | | |
|------|---------------------------------------------------------------------------------------------------------------------------------|------|
| I. | INTRODUCTION | 1452 |
| II. | THE UNITARY EXECUTIVE DEBATE: SOME BRIEF COMMENTS ON ITS SIGNIFICANCE, ON HISTORICAL METHOD, AND ON METHODOLOGY | 1460 |
| | A. <i>The Importance of the Unitary Executive Debate</i> | 1460 |
| | B. <i>Historical Method</i> | 1462 |
| | C. <i>Methodology: The Relevance of Departmental or Coordinate Review</i> | 1463 |
| III. | THE UNITARY EXECUTIVE DURING THE EARLY YEARS OF THE REPUBLIC, 1787-1837 | 1472 |
| | A. <i>George Washington</i> | 1474 |
| | B. <i>John Adams</i> | 1490 |
| | C. <i>Thomas Jefferson</i> | 1495 |
| | D. <i>James Madison</i> | 1506 |
| | E. <i>James Monroe</i> | 1512 |
| | F. <i>John Quincy Adams</i> | 1522 |
| | G. <i>Andrew Jackson</i> | 1526 |
| | 1. Jackson's Claims About the Role of the President in Our Constitutional System | 1527 |
| | 2. Jackson, the Removal Power, and the President's Power to Execute the Laws | 1531 |

[†] Professor of Law, Northwestern University, and Associate, Hogan & Hartson. We would like to thank Gary Lawson, Thomas W. Merrill, Martin H. Redish and the participants in the Case Western Reserve Law Review Symposium on Presidential Power in the Twenty-First Century for helpful suggestions and comments. We are also deeply grateful to Christopher Rohrbacher for invaluable research assistance and many long hours of hard work. Lastly, and most of all, we would like to thank Mary Tyler Calabresi and Kris K. Yoo for their help, patience, and support.

| | |
|--------------------------------------------------------------------------------------------|------|
| 3. Jackson's Battle with the Bank and the Removal of Treasury Secretary Duane | 1538 |
| IV. CONCLUSION | 1559 |

[The Decision of 1789] amounted to a legislative construction of the constitution, and *it has ever since been acquiesced in and acted upon*, as of decisive authority in the case.

. . . [T]he construction given to the Constitution in 1789 has continued to rest on this loose, incidental declaratory opinion of Congress, and *the sense and practice of government since that time. It may now be considered as firmly and definitively settled*, and there is good sense and practical utility in the construction.

James Kent¹

The public . . . acquiesced in [the Decision of 1789], and it constitutes, perhaps the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions. Even the most jealous advocates of state rights seem to have slumbered over this vast reach of authority, and have left it untouched.

Joseph Story²

I. INTRODUCTION

The last fifteen years have seen an intense debate over the scope of the President's power to execute the laws. Presidential removal power, power to gather information from subordinate executive officials, and power to bind subordinate executive officials have all been the subject of controversy. This modern debate began with claims of executive authority advanced by President Reagan, whose administration continually questioned the constitutionality of independent agencies and of independent counsels ap-

1. 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 310 (1st ed., O. Halsted ed., 1826) (emphasis added).

2. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES Section 1543 (4th ed., Thomas M. Cooley ed., 1873).

pointed under the Ethics in Government Act of 1978 ("EIGA"). President Bush continued and intensified these claims, and (after a slow start) President Clinton has begun to see some merit in them as well. In retrospect, one could conclude with some irony that the passage of the EIGA in 1978 has done much to trigger this debate by encouraging recent Presidents to reassert vigorously their constitutional prerogatives.

As these reassertions of presidential authority began to receive the attention of the Supreme Court and of the legal academy, two principle camps grew up. The first camp consists of so-called unitary executive theorists like ourselves who support a broad presidential power of removal and control over law execution. The second consists of a group of anti-unitary executive theorists who have argued for a more limited presidential role.

To date the argument between these two camps has proceeded mainly along three axes. First, there has been spirited debate over whether unitarians like ourselves are right in arguing that the text³ and structure⁴ of the Constitution as originally understood⁵ created

3. For textual arguments supporting the unitary executive, see Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1378-86, 1389-1400 (1994) [hereinafter Calabresi, *Power Grants*]; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 559-99 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165-68 (1992); Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J. L. & POL. 483, 499-504 (1988) [hereinafter Cross, *Executive Orders 12,291 and 12,498*]; David P. Currie, *The Distribution of Powers after Bowsher*, 1986 SUP. CT. REV. 19, 31-36; Lee S. Liberman, *Morrison v. Olson: A Formalistic Perspective on Why the Court Was Wrong*, 38 AM. U. L. REV. 313, 314-17 (1989); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 58-63; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 14-15 (1993); Kevin H. Rhodes, *A Structure Without Foundation: A Reply to Professor Froomkin*, 88 NW. U. L. REV. 1406, 1408-14 (1994); J. Gregory Sidak, *The President's Power of the Purse*, 1989 DUKE L.J. 1162, 1183-89; Charles N. Steele & Jeffrey H. Bowman, *The Constitutionality of Independent Regulatory Agencies Under the Necessary and Proper Clause: The Case of the Federal Election Commission*, 4 YALE J. ON REG. 363 (1987); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597-99, 643-50 (1984).

4. For structural arguments supporting the unitary executive, see Calabresi, *Power Grants*, *supra* note 3, at 1386-89; Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 504-08; Liberman, *supra* note 3, at 342-58; Thomas W. Merrill, *The Constitutional Separation of Powers*, 1991 SUP. CT. REV. 225, 228-29, 235-45 [hereinafter Merrill, *Separation of Powers*]; Miller, *Independent Agencies*, *supra* note 3, at 63-67; Rhodes, *supra* note 3, at 1414-18; Strauss, *supra* note 3, at 640-69; Susan M. Davies, Comment, *Congressional Encroachment on Executive Branch Communications*, 57 U. CHI. L. REV. 1297, 1314-20 (1990).

5. For originalist arguments supporting the unitary executive, see Steven G. Calabresi,

a strongly unitary executive branch. Anti-unitarians have heatedly disagreed with the unitarian account and have offered their own non-unitarian accounts of the text,⁶ structure,⁷ and original history.⁸ Argument has been joined over this issue most recently by Professors Lawrence Lessig, Cass Sunstein, and Martin Flaherty⁹ on the anti-unitarian side and by Professor Calabresi and Saikrishna Prakash on the pro-unitarian side.¹⁰

Second, there has been some debate between unitarians and anti-unitarians over the significance and relevance of changed circumstances. Professors Lessig and Sunstein have argued that because of changed circumstances a mostly unitary executive is compelled today where one was not compelled before, and Professor Calabresi has argued that changed circumstances make the unitary

Some Normative Arguments for the Unitary Executive, 48 ARK. L. REV. 23, 37-47 (1995) [hereinafter Calabresi, *Some Normative Arguments*]; Frank B. Cross, *The Surviving Significance of the Unitary Executive*, 27 HOUS. L. REV. 599, 601-18 (1990); Miller, *Independent Agencies*, *supra* note 3, at 67-71; Monaghan, *Protective Power*, *supra* note 3, at 15-20; P. Strauss, *supra* note 3, at 599-601, 603-04; Davies, *supra* note 4, at 1299-1306; Saikrishna Bangalore Prakash, Note, *Hail to the Chief Administrator: The Framers and the President's Administrative Powers*, 102 YALE L.J. 991, 1012-15 (1993).

6. See Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 712-14 (1987) [hereinafter Entin, *Removal Power*]; A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1350-66 (1994) [hereinafter Froomkin, *Imperial Presidency*]; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 47-55, 61-70 (1994); Morton Rosenberg, *Congress's Prerogative over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 649-51 (1989) [hereinafter Rosenberg, *Congress's Prerogative*]; Morton Rosenberg, *Presidential Control of Agency Rule-making: An Analysis of Constitutional Issues that May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1203-10 (1981) [hereinafter Rosenberg, *Presidential Control*]; Cass R. Sunstein, *Article II Revisionism*, 92 MICH. L. REV. 131 (1993); A. Michael Froomkin, Note, *In Defense of Administrative Agency Autonomy*, 96 YALE L.J. 787, 799-801 (1987) [hereinafter Froomkin, Note]; Joseph P. Verdon, Note, *The Vesting Clauses, the Nixon Test, and the Pharaoh's Dreams*, 78 VA. L. REV. 1253, 1277-82 (1992).

7. See A. Michael Froomkin, *Imperial Presidency*, *supra* note 6, at 1366-76; Lessig & Sunstein *supra* note 6, at 85-106; Thomas O. Sargentich, *The Contemporary Debate About Legislative-Executive Separation of Powers*, 72 CORNELL L. REV. 430 (1987); Froomkin, Note, *supra* note 6, at 801-04.

8. See Theodore Y. Blumoff, *Illusions of Constitutional Decisionmaking: Politics and the Tenure Powers in the Court*, 73 IOWA L. REV. 1079, 1086-93 (1988); Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 WM. & MARY L. REV. 211, 212-24 (1989) [hereinafter Casper, *Early Practices*]; Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 140-53 (1994); Froomkin, Note, *supra* note 6, at 804-08.

9. See Lawrence Lessig & Cass R. Sunstein, *supra* note 6; Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996).

10. See Calabresi & Prakash, *supra* note 3.

executive more necessary now than ever before.¹¹ Professors Abner Greene and Martin Flaherty, however, disagree. They see changed circumstances as largely pointing in an anti-unitarian direction.¹²

Third, and lastly, there has been some related debate over whether normatively a strongly unitary executive is a good thing. Professor Calabresi and others have argued that it is.¹³ Professors Peter Shane and Michael Fitts,¹⁴ among many others,¹⁵ have argued that it is not.

Recently, the opponents of the unitary executive have opened up a fourth front in this struggle by placing increasing emphasis on early American practices with respect to removal power and powers of presidential supervision.¹⁶ Most notably, in their seminal article *The President and the Administration*, Professors Lawrence Lessig and Cass Sunstein conducted an extensive survey of our early practices with respect to presidential control over law execution and concluded that the idea that the Framers meant to create a

11. See Lessig & Sunstein, *supra* note 6, at 93-106; Calabresi, *Some Normative Arguments*, *supra* note 5, at 23 (noting that changed circumstances strengthen the normative case for the unitary executive as a device to control factions).

12. See Greene, *supra* note 8, at 153-76; Flaherty, *supra* note 9, at 1810-38.

13. See Calabresi, *Some Normative Arguments*, *supra* note 5, at 48-102; Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 70-80 (1990) [hereinafter Krent, *Fragmenting*]; Harold J. Krent & Ethan G. Shenkman, *Of Citizens Suits and Citizen Sunstein*, 91 MICH. L. REV. 1793, 1798-1810 (1993); Miller, *Independent Agencies*, *supra* note 3, at 56-57; Geoffrey P. Miller, *The Unitary Executive in a Unified Theory of Constitutional Law: The Problem of Interpretation*, 15 CARDOZO L. REV. 201, 213-18 (1993); P. Strauss, *supra* note 3, at 622-25; Sidak, *supra* note 3, at 1202-06.

14. See Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential of Rulemaking*, 48 ARK. L. REV. 161 (1995); Michael A. Fitts, *The Paradox of Power in the Modern State: Why a Unitary, Centralized Presidency May Not Exhibit Effective or Legitimate Leadership*, 144 U. PENN. L. REV. 827 (1996).

15. See Blumoff, *supra* note 8, at 1151-55; Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273, 275-76 (1993); Greene, *supra* note 8, at 177-79; Lessig & Sunstein, *supra* note 6, at 93-102; Peter P. Swire, Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1768-75 (1985).

16. See Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561; Blumoff, *supra* note 8, at 1093-1101; Casper, *Early Practices*, *supra* note 8, at 227-42; Gerhard Casper, *Executive-Congressional Separation of Power During the Presidency of Thomas Jefferson*, 47 STAN. L. REV. 395 (1995) [hereinafter Casper, *Thomas Jefferson*]; Kent Greenfield, *Original Penumbra: Constitutional Interpretation in the First Year of Congress*, 26 CONN. L. REV. 79, 142-43 (1993); Froomkin, Note, *supra* note 6, at 805-08.

strongly unitary executive is an ahistorical myth.¹⁷ Professor Calabresi and Sai Prakash responded in *The President's Power to Execute the Laws*, concluding that the text and pre-ratification history of the Constitution strongly support the unitariness of the executive branch and that nothing in the early post-ratification period raised serious questions about that support.¹⁸ Professor Martin Flaherty in turn responded with an insightful article disputing Professor Calabresi and Sai Prakash's interpretation of the constitutional text and the pre-ratification history regarding the unitary executive.¹⁹ Along the way, Professor Flaherty also chose flatly to assert that "more than 200 years of practice under the Constitution suggest that the inherent fluidity and the system of checks and balances render a strict separation [of powers] impossible."²⁰ Unhappily, little has been written on the history of the unitary executive that would support or disprove Professor Flaherty's assertion. Prior articles have either analyzed a small number of historical events in isolation or have merely sketched the history of the unitary executive debate in a truncated or superficial way.²¹

17. See Lessig & Sunstein, *supra* note 6, at 12-78.

18. See Calabresi & Prakash, *supra* note 3.

19. See Flaherty, *supra* note 9, at 1755-1810.

20. See *id.* at 1816 (internal quotations omitted) (quoting FORREST McDONALD, *THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY* 180 n.35 (1994) [hereinafter McDONALD, *AMERICAN PRESIDENCY*]). Flaherty also cited EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS* 76-84 (1940) [hereinafter CORWIN, *THE PRESIDENT* (1940 ed.)]; Bloch, *supra* note 16, at 618-51; and, curiously enough, Lessig & Sunstein, *supra* note 6, at 14-22, as also supporting this proposition. See Flaherty, *supra* note 9, at 1816.

Professor Flaherty is hardly alone in jumping to this conclusion. See Miller, *Independent Agencies*, *supra* note 3, at 83-84 ("[T]he executive branch has not consistently opposed independent agencies on constitutional grounds."); Paul Verkuil, *The Status of Independent Agencies after Bowsher v. Synar*, 1986 DUKE L.J. 779, 779 [hereinafter Verkuil, *Independent Agencies after Bowsher*] ("[N]o administration prior to the present one directly attacked the concept of agency independence from the constitutional perspective.").

21. See Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 484-98; Entin, *Removal Power*, *supra* note 6, at 714-24; Bruce Ledewitz, *The Uncertain Power of the President to Execute the Laws*, 46 TENN. L. REV. 757, 776-96 (1979); Angel M. Moreno, *Presidential Coordination of the Independent Regulatory Process*, 8 ADMIN. L.J. AM. U. 461, 481-88 (1994); Rosenberg, *Congress's Prerogative*, *supra* note 6, at 649-61; Charles Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Officers*, 63 B.U. L. REV. 59, 70-76 (1983); Froomkin, Note, *supra* note 6, at 805-08.

The most complete historical treatments of the unitary executive are offered by Louis Fisher, *Congress and the Removal Power*, 10 CONG. & PRESIDENCY 63 (1983) [hereinafter Fisher, *Removal Power*], and Charles Warren, *Presidential Declarations of Independence*, 10 B.U. L. REV. 1 (1930). Fisher's work only addresses one facet of the unitary executive: the removal power. Warren's article, while extremely helpful, omits certain key historical episodes and, based on its date of publication, necessarily does not proceed beyond

In this Article, we want to begin the process of revisiting the unitary executive debate from the fourth vantage point of the practice and tradition over the whole of the last 208 years. Our project here, and in a series of three additional forthcoming Articles, is to consider the unitary executive debate from a Burkean, common law constitutionalist's perspective. We want to examine the claim that we believe is implicit in much anti-unitarian scholarship that the custom, tradition, and practice of the last 208 years amounts to a *presidential* acquiescence in the existence of a congressional power to (at times) limit the President's removal power and curtail his other constitutionally granted mechanisms of control over law execution. We disagree that Presidents have acquiesced in the constitutionality of such limits, and we seek in this series of Articles to prove that they have not done so.

We start with the premise expressed and defended in Professor Calabresi's prior writings that the Framers set up a strongly unitary executive and that this is normatively appealing. Building on that premise, we argue here that there is no contrary longstanding custom, tradition, or practice that should cause a Burkean common law constitutionalist to conclude that tradition and custom forecloses the adoption of what we believe is the normatively appealing original design. Indeed, we would go further and argue that over the past 208 years a powerful tradition has grown up whereby Presidents have consistently defended the prerogatives the text of the Constitution originally gave them and that public choice theory suggests they should have.

This leads to a crucial methodological point that underlies our analysis: our decision here to focus on prior *presidential* practices, traditions, and customs. Because we are not Burkean common law constitutionalists ourselves, we do not deem it necessary for our purposes to prove that there is a 208-year-old three-branch consensus about these matters. Clearly, there is not. We claim only that there is no consistent three branch anti-unitarian custom, tradition, or practice that *Presidents have acquiesced in* that trumps the constitutional text and the original design.

We believe this Article, and the three that will follow it, thoroughly establish this more limited point about the customs, practices, and traditions of the American people with respect to presidential power over the last 208 years. Congress and the Supreme

Court have vacillated over whether to recognize presidential claims of power over removals and law execution. Sometimes they have acknowledged the power and sometimes they have denied it. The tradition within the executive branch, however, has been overwhelmingly and consistently unitarian. For 208 years, Presidents have vigorously guarded the powers the Framers gave them, so much so that today no reasonable Burkean could conclude that a congressional easement has been established across the Executive Power Vesting Clause of Article II by the passage of time.

Our position in this respect is very much like the one the Supreme Court took in *INS v. Chadha*²² when it struck down the legislative veto on originalist constitutional grounds even though Congress had been including such vetoes in federal statutes since before the New Deal. The Supreme Court in *Chadha* said this congressional practice was not relevant to the constitutional question, in part because most Presidents had refused to acquiesce in it and had protested it even when signing such statutes into law.

As we hope this Article will begin to show, we think there is if anything an even more vigorous presidential practice of asserting power over removals and control over law execution. After briefly surveying the practice and recent public statements of almost every President, we conclude our four article series by arguing that, as in *Chadha*, the problem of the scope of presidential power over law execution is *not* one that can be resolved with reference to the fabric of statutes that Congress has at times passed. We thus reject approaches like the one taken by Justice Brandeis in his dissent in *Myers v. United States* that seek to determine the scope of presidential power by looking at biased congressional views on the subject expressed in a spider's web of statutory enactments.

Our historical survey will seek to trace the development over time of all three of the mechanisms essential to any theory of the unitary executive. These include: the President's power of removal; the President's power to direct subordinate executive officials' exercises of discretionary executive power; and the President's power to nullify or veto subordinate executive officials' exercises of discretionary executive power.²³ Each of the four Articles will

22. 462 U.S. 919 (1983).

23. See Calabresi & Prakash, *supra* note 3, at 595-99; Calabresi & Rhodes, *supra* note 3, at 1166; see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1242-45 (1994); Liberman, *supra* note 3, at 353-54.

focus particular attention on one of the four great crises that constitute the key moments in the development of the unitary executive. This Article will examine the development of the unitary executive over the course of the first fifty years of our constitutional history focussing especially on the events surrounding President Andrew Jackson's removal of Treasury Secretary William J. Duane. The second Article in the series will focus on the period between 1837 and the end of Reconstruction with a special focus on the attempted impeachment of President Andrew Johnson and the rise and fall of the Tenure of Office Act. The third Article will focus on the unitary executive during the third half-century of American constitutional history with special attention given to Franklin D. Roosevelt's assertions of power during the debates on executive reorganization in 1937-1938. And, the final Article will discuss the modern post-New Deal history with a focus on the crisis that we believe has been triggered by the EIGA.²⁴ We regret the need to break our book length argument up into four pieces but believe it is essential that we do so if we are to do justice to each historical epoch.

A close examination of the history over the last 208 years has persuaded us that this country's historical practice regarding issues of presidential control over removal and law execution either supports the unitary executive position or at best is inconclusive. Our survey of the history shows that *Presidents have consistently as-*

So defining the scope of our work calls for several caveats. With limited exceptions, we limit our discussion to the execution of the law directly under the Executive Power Clause. We do not address the President's control over areas such as the military, spending, and foreign relations. These require the careful balancing of numerous and often opposing textual provisions of the Constitution. We also do not discuss another area that, while having strong implications for the President's ability to execute the laws, is also governed by a specific constitutional provision (i.e., appointments).

24. Most scholars to date have mentioned the first three crises as being of critical importance. See Lessig & Sunstein, *supra* note 6, at 78, 84 n.334. The fact that other scholars have paid attention to these episodes appears to confirm the propriety of focusing on these events. See Entin, *supra* note 6, at 720-22 (Jackson and Johnson); Ledewitz, *supra* note 21, at 794 n.154 (Jackson); Miller, *Independent Agencies*, *supra* note 3, at 67, 85 (Johnson and Roosevelt); Monaghan, *supra* note 3, at 19-20 (Jackson); Moreno, *supra* note 21, at 485 (Roosevelt); Rosenberg, *Congress's Prerogatives*, *supra* note 6, at 657 & n.169 (Roosevelt); Itzhak Zamir, *Administrative Control of Administrative Action*, 57 CAL. L. REV. 866, 875, 877 (1969) (Jackson); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 898-900 (1993) (Johnson).

We believe the modern crises over the EIGA warrants inclusion on an equal footing with the first three.

served their authority to execute the laws through each of the three mechanisms described above since the earliest days of the Republic. Thus, far from supporting the conclusions of Professor Flaherty, the historical practice over the last 208 years tends *to confirm* the textual, structural, originalist, and normative arguments in favor of a presidential power to control the execution of the laws.²⁵

II. THE UNITARY EXECUTIVE DEBATE: SOME BRIEF COMMENTS ON ITS SIGNIFICANCE, ON HISTORICAL METHOD, AND ON METHODOLOGY

Before beginning our discussion of the Burkean argument from practice, custom, and tradition, it is appropriate that we briefly say a bit more about the methodology and vision of constitutional law that underlies our analysis and about the legal significance of our project. We will first discuss the importance of the unitary executive debate and of the claims we are developing about precedent within the executive branch about the scope of the executive power. Next, we will comment briefly on some matters of historical method. Finally, we will conclude with a discussion of the relationship between the claims developed in this Article and the President's role as a constitutional interpreter. With these items completed, we will then turn in Part III to our historical exegesis.

A. *The Importance of the Unitary Executive Debate*

It is easy today to dismiss the removal debate as being of inconsequential importance. Clearly, many factors affect presidential power over executive branch subordinates—the removal power is only one among these many factors. Presidential popularity, support in Congress, and skill in picking initial appointees all affect the degree to which a President is able to command the loyalty of his subordinates. Moreover, the removal power has not been exercised

25. Professor Flaherty's misassessment of the unitary executive's history is particularly conspicuous given the sharpness of the criticisms he directed at the historical analysis of the Founding era contained in the previous work of Professor Calabresi and Sai Prakash. Professor Flaherty criticizes Calabresi and Prakash for supposedly failing to consider all relevant sources, for focusing on a few historical examples in isolation, and particularly for failing to consider a broad enough range of history to lead to sound conclusions. See Flaherty, *supra* note 9, at 1750, 1774-77, 1788-1801. It appears that the same criticisms would apply with greater justice to the 13 page discussion of changed circumstances in Part IV of Professor Flaherty's own Article. See *id.* at 1816-28.

often in recent years. At times, it even appears that presidential appointees in independent agencies are more committed to the administration's policy program than are the President's own Cabinet Secretaries.

While it is certainly true that presidential power over the executive branch is a complex phenomenon, it would be a great mistake to underestimate the importance of the removal power. Like the veto power or the war power, the removal power does not need to be exercised often to be effective. All that is needed is an early firing or two, and a conviction that a particular President is willing to fire again, and the removal power will have accomplished its chilling effect on insubordinate employees. The removal power, like the power to issue binding orders to executive branch subordinates, is a potentially powerful tool of executive branch unitariness.

It is probably the case that the removal power is most valuable when the President's party also controls a majority in the Senate. Without such a majority, presidential removal power becomes politically costly because Presidents who fire subordinates will have to endure hostile senatorial scrutiny of their replacements. Concerns of this kind may well explain why President Clinton has recently retained Janet Reno as the Attorney General, even though press reports suggest he wanted to replace her. Thus, those of us who have learned to live with opposite party control of the White House and of the Senate may well underestimate the importance of the removal power. It is a potent weapon at all times, and undoubtedly an even more potent weapon when the executive and legislative branches of government are not divided as they have been in recent times.

In developing our argument that Presidents have always appreciated the vital importance of the removal power, we intend to set the stage for several legal claims that Presidents may want to make in resisting congressional efforts to curtail either that power or the parallel presidential power to issue binding orders to executive branch subordinates.

First, as mentioned above, we want to argue that, as in *Chadha*, presidential non-acquiescence to congressional claims of power means that the Supreme Court in future litigation should decide removal cases with reference to the text of the Constitution as originally understood. We believe this clearly means the Supreme Court should recognize that the Constitution creates what we have described as a strongly unitary executive.

Second, we believe that President Clinton and all future incumbent Presidents should recognize that there exists a strong internal executive branch precedent, established over 208 years, whereby Presidents have always resisted serious incursions on the principle of the unitary executive. Pursuant to this, we believe President Clinton and his successors should view themselves as being compelled to veto any statute presented to them that violates the principles of strong executive branch unitariness. Obviously, the EIGA is such a statute, and, not coincidentally, we note that it is soon coming up for reauthorization. Moreover, we believe Presidents should enforce unconstitutional statutes like the EIGA with the greatest circumspection.

Finally, we believe President Clinton and his successors should continue to challenge unconstitutional statutes like the EIGA in federal court notwithstanding judicial decisions like *Morrison v. Olson* and *Humphrey's Executor*, which are inconsistent with the unitary executive. In doing this, they will be keeping faith with their many predecessors who never let temporary defeats over matters like the adoption of the unconstitutional Tenure of Office Act deflect them from the long term project of protecting the vital powers of the presidential office.

The removal debate, then, is of vital significance. We have begun this four Article series because we believe that, and because we believe that President Clinton and his successors can act upon our historical findings in the three ways just discussed.

B. Historical Method

A second introductory concern relates to matters of historical method. While we do not wish to enter into an extended discussion on this already much debated topic, we do believe it is necessary that we say something about the method we have followed in this Article and that we intend to follow in the three sequels to come. We do not claim to be historians, and we do not claim here to have produced original, ground-breaking historical research. Although we have canvassed many original sources, we have relied heavily on the famous and principle secondary works that discuss each of the presidencies or historical epochs that are the subject of this Article. Our debts are especially great in this particular Article to Leonard White, James Hart, Glenn Phelps, Forrest McDonald, and Robert Remini, among many others. Their groundbreaking and original work has been vital to the success of our project.

The original contribution *we* seek to make is to pull together in one place the entire set of presidential claims about the unitary executive debate that have been made over the whole of the last 208 years. No one to our knowledge has done this as thoroughly as we are trying to do it, and it is not clear to us that anyone has even tried since Chief Justice Taft wrote his long and well researched opinion in *Myers v. United States*. We believe it is vitally important for constitutional lawyers to have this information gathered together in one place in a form that has been updated since the *Myers* opinion was written. We thus approach this historical research project as constitutional lawyers and not as legal historians. We are interested in history in this project, but only in the way that lawyers are interested in history. For these purposes it is entirely appropriate that we rely on the sources we have chosen and that we skip somewhat quickly over vast periods of time. In doing this, we are no more guilty of doing "history lite" than legal historians are guilty of doing "law lite." We consume history here for a particular purpose, and it is a much narrower purpose than the one that often drives historians.

*C. Methodology: The Relevance of Departmental
or Coordinate Review*

Lastly, and most importantly, we think it is important that our readers understand that we undertake this massive project very much influenced by, and in the spirit of, the recent debate that has raged about the role all three branches of the federal government must and do play in the interpretation and enforcement of the Constitution.²⁶ Ever since former Attorney General Meese's famous Tulane speech,²⁷ many academics and judges have been more conscious than ever of the role Presidents and congresses can claim for themselves as constitutional interpreters alongside the federal courts. This role was ably defended by Judge Frank Easterbrook in an article in this law review entitled *Presidential Review*,²⁸ and it has been defended recently as well by Professor

26. For a helpful description and list of examples of coordinate construction, see LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 231-46 (1988).

27. General Meese's speech is reprinted, along with other useful commentaries, in THE FEDERALIST SOCIETY, WHO SPEAKS FOR THE CONSTITUTION? THE DEBATE OVER INTERPRETIVE AUTHORITY (1992).

28. Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905 (1990).

Michael Stokes Paulsen²⁹ and by Professor Gary Lawson writing with Christopher D. Moore.³⁰

Despite the ancient vintage of this theory of departmental or coordinate construction of the Constitution,³¹ the suggestion that the Supreme Court may not have the last word on matters of constitutional interpretation seems at first to be quite jarring to modern lawyers whose introduction to constitutional law began with *Marbury*'s ringing declaration that "[i]t is emphatically the province and duty of the judicial department to say what the law is."³² The declaration carries the implication that since the Constitution was the supreme law of the land, the judiciary must have the authority to interpret the Constitution. However, a close reading of *Marbury* reveals that Chief Justice Marshall's opinion in that famous case never claimed that interpretation of the law was the *exclusive* province of the courts. On the contrary, Marshall reasoned that courts may construe the Constitution because "[t]hose who apply the rule to particular cases, must of necessity expound and interpret that rule."³³ Thus, scholars have universally acknowledged that although *Marbury* firmly established the judiciary's right to interpret

29. See Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994) [hereinafter Paulsen, *Most Dangerous Branch*].

30. See Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

31. In *The Federalist No. 49*, James Madison declared, "The several departments being perfectly co-ordinate by the terms of their common commission, neither of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers." THE FEDERALIST NO. 49, at 339 (James Madison) (J. Cooke ed., 1961). Presidential power to interpret the law was later asserted by Presidents Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt. See GERALD GUNTHER, CONSTITUTIONAL LAW 21-28 (11th ed. 1985); Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771, 777-82 (1994); Michael Stokes Paulsen, *The Merryman Power and the Dilemma of Autonomous Executive Branch Interpretation*, 15 CARDOZO L. REV. 81, 85-97 (1993) [hereinafter Paulsen, *Merryman Power*].

For a comprehensive collection of instances of presidential constitutional construction by numerous Presidents from Franklin Pierce to George Bush, see Christopher N. May, *Presidential Defiance of "Unconstitutional" Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 904-86 (1994). For an interesting discussion of examples of constitutional construction by Congress, see DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966). For useful compilations of executive, legislative, judicial, and scholarly materials on the subject, see THE FEDERALIST SOCIETY, *supra* note 27; LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 16-26 (1992); WALTER F. MURPHY ET AL., AMERICAN CONSTITUTIONAL INTERPRETATION 195-247 (1st ed. 1986).

32. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

33. *Id.* at 177.

the law, it fell far short of making those interpretations binding on the other branches.³⁴ Other commentators have also noted that notions of judicial supremacy are inconsistent with the coordinacy of the three branches of the federal government.³⁵ Therefore, after brief reflection, it comes as little surprise that, as Professor Thomas Merrill has noted, judicial supremacy has been rejected by a veritable all-star list of constitutional scholars³⁶ and that the list of commentators endorsing some form of coordinate construction has grown more impressive with each passing year.³⁷

34. See JOHN AGRESTO, *THE SUPREME COURT AND CONSTITUTIONAL DEMOCRACY* 104-07 (1984); FISHER, *CONSTITUTIONAL DIALOGUES*, *supra* note 26, at 242-43; LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-2, at 25 (2d ed. 1988); Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 63 (1974) [hereinafter Brest, *Congress as Constitutional Decisionmaker*]; Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587-88 (1975) [hereinafter Brest, *Conscientious Legislator*]; Thomas W. Merrill, *Judicial Opinions as Binding Law and as Explanations for Judgments*, 15 CARDOZO L. REV. 43, 51 (1993) [hereinafter Merrill, *Judicial Opinions*]; Paulsen, *Most Dangerous Branch*, *supra* note 29, at 241-45; William W. Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1, 37.

35. See Paulsen, *Most Dangerous Branch*, *supra* note 29, at 228-40.

36. See Merrill, *Judicial Opinions*, *supra* note 34, at 49 n.26 (citing ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 263-64 (1962); EDWARD S. CORWIN, *COURT OVER THE CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* 68-69 (1939); PHILIP B. KURLAND, *POLITICS, THE CONSTITUTION, AND THE WARREN COURT* 116 (1970); Gerald Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1, 25 n.155 (1964); Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1363 n.2 (1973); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1008 (1965)).

37. For commentary generally supporting coordinate construction, see AGRESTO, *supra* note 34, at 104-07; FISHER & DEVINS, *supra* note 31, at 1-6, 8, 10-16; Stephen Carter, *The Courts Are Not the Constitution*, WALL ST. J., Feb. 7, 1989, at A24; Neal Devins, *The Constitution Between Friends*, 67 TEX. L. REV. 213 (1988) (reviewing FISHER, *CONSTITUTIONAL DIALOGUES*, *supra* note 26); John Harrison, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 371 (1988); Rex E. Lee, *The Provinces of Constitutional Interpretation*, 61 TUL. L. REV. 1009 (1987); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380 (1988). For defenses of judicial supremacy in constitutional interpretation, see Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Burt Neuborne, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 375, 377 (1988); Michel Rosenfeld, *Executive Autonomy, Judicial Authority and the Rule of Law: Reflections on Constitutional Interpretation and the Separation of Powers*, 15 CARDOZO L. REV. 137, 155-57 (1993).

We do not intend here to delve into all of the many complex and nuanced issues that are raised by applying the principals of coordinate construction to all exercises of presidential Article II powers.³⁸ For purposes of this series of Articles, it is sufficient for

For commentary supporting the executive branch's authority to interpret the Constitution, see RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 308 (1974); TRIBE, *supra* note 34, at 34-37; William P. Barr, *Attorney General's Remarks, Benjamin N. Cardozo School of Law, November 15, 1992*, 15 CARDOZO L. REV. 31, 39 (1993); Easterbrook, *supra* note 28; Douglas W. Kmiec, *OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive*, 15 CARDOZO L. REV. 337, 348-51 (1993); John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993) [hereinafter McGinnis, *Opinion Function*]; John O. McGinnis, *Principle Versus Politics: The Solicitor General's Office in Constitutional and Bureaucratic Theory*, 44 STAN. L. REV. 799, 805-06 (1992) (reviewing CHARLES FRIED, *ORDER AND LAW* (1991)); Merrill, *Separation of Powers*, *supra* note 34, at 240; Merrill, *Judicial Opinions*, *supra* note 36, at 49; Paulsen, *Merryman Power*, *supra* note 31; Paulsen, *Most Dangerous Branch*, *supra* note 29; Michael B. Rappaport, *The President's Veto and the Constitution*, 87 NW. U. L. REV. 735, 766-83; J. Gregory Sidak & Thomas A. Smith, *Four Faces of the Item Veto: A Reply to Tribe and Kurland*, 84 NW. U. L. REV. 437, 452-60 (1990). For critiques of the President's power to interpret the Constitution, see Eugene Gressman, *Take Care, Mr. President*, 64 N.C. L. REV. 381 (1986); May, *supra* note 31, at 889-93; Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 397-98 (1987); Arthur S. Miller & Jeffrey H. Bowman, *Presidential Attacks on the Constitutionality of Federal Statutes*, 40 OHIO ST. L.J. 51 (1979); Burt Neuborne, *The Binding Quality of Supreme Court Precedent*, 61 TUL. L. REV. 991 (1987).

For commentary supporting the Congress's authority to interpret the Constitution, see Archibald Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 205-11 (1971); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) [hereinafter Fisher, *Constitutional Interpretation*]; Eugene W. Hickok, Jr., *The Framers' Understanding of Constitutional Deliberation in Congress*, 21 GA. L. REV. 217 (1986); Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3 (1975); Mark V. Tushnet, *The Constitution Outside the Courts: A Preliminary Inquiry*, 26 VAL. U. L. REV. 437 (1992); Vik D. Amar, Note, *The Senate and the Constitution*, 97 YALE L.J. 1111, 1116, 1123 (1988); Mark E. Herrmann, Note, *Looking Down from the Hill: Factors Determining the Success of Congressional Efforts to Reverse Supreme Court Interpretations of the Constitution*, 33 WM. & MARY L. REV. 543 (1992). Notably, even those who question whether Congress is institutionally suited to evaluate the constitutionality of statutes agree that the government would be better served if it tried to do so. See Paul Brest, *Congress as Constitutional Decision-maker*, *supra* note 34, at 98-105; Brest, *Conscientious Legislator*, *supra* note 34, at 587; Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587 (1983); Abner J. Mikva & Joseph R. Lundy, *The 91st Congress and the Constitution*, 38 U. CHI. L. REV. 449, 449 (1971); Stephen F. Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311 (1987). For commentary challenging Congress's capacity to interpret the Constitution, see Owen M. Fiss, *The Supreme Court 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 9-10 (1979); Gerald L. Neuman, *Variations for Mixed Voices*, 137 U. PA. L. REV. 1851 (1989) (reviewing FISHER, *CONSTITUTIONAL DIALOGUES*, *supra* note 26).

38. Some forms of coordinate construction have remained quite controversial. Vigorous

us to note that coordinate construction is especially called for when separation of powers matters are involved. The Supreme Court's inconsistent resolution of separation of powers cases has led some commentators to ask whether the judiciary is even capable as an institution of resolving these issues.³⁹ Moreover, the Supreme Court is sometimes an interested party in separation of powers disputes; permitting it to be the final arbiter of separation of powers questions would contravene the jurisprudential rule against permitting parties from being judges in their own causes.⁴⁰ Other commentators worry that giving one branch a monopoly on constitutional interpretation will stifle valuable interbranch dialogues.⁴¹

debate currently rages over whether or not the President is obligated to enforce federal court judgments. Professor Paulsen says he is not, while Professor Lawson and Christopher Moore disagree. *Cf.* Paulsen, *supra* note 29, with Lawson & Moore, *supra* note 30. Moreover, to pick a different context, many commentators have questioned the Supreme Court's deference to congressional interpretations of the Fourteenth Amendment first announced in *Katzenbach v. Morgan*, 384 U.S. 641 (1966). *See* Stephen L. Carter, *The Morgan "Power" and the Forced Reconsideration of Constitutional Decisions*, 53 U. CHI. L. REV. 819 (1986); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Ross, *supra* note 37. *But see* Robert A. Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81, 112-18 (defending the *Morgan* power). The Supreme Court is apparently reconsidering the issue as well. *See Flores v. City of Boerne*, 73 F.3d 1352, 1357-58 (5th Cir.), *cert. granted*, 117 S. Ct. 293 (1996).

39. *See* Louis Fisher, *Separation of Powers: Interpretation Outside the Courts*, 18 PEPP. L. REV. 57, 57-62 (1990); *see also* Cox, *supra* note 37, at 204-05; Mikva & Lundy, *supra* note 37, at 497-98.

40. *Compare* Merrill, *Judicial Opinions*, *supra* note 34, at 53 with David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113, 131-34 (1993).

For example, it is somewhat troubling that Chief Justice Rehnquist wrote the majority opinion in *Morrison v. Olson*, 487 U.S. 654 (1988). Up to that point he had been a strong supporter of presidential power, *see* FISHER & DEVINS, *supra* note 31, at 147, and just two years earlier had supported an early draft of *Bowsher v. Synar*, 478 U.S. 714 (1986), strongly endorsing the President's right to remove all officers wielding executive power, Bernard Schwartz, *An Administrative Law "Might Have Been"—Chief Justice Burger's Bowsher v. Synar Draft*, 42 ADMIN. L. REV. 221, 226-27, 232 (1990). And yet, Rehnquist authored a sweeping opinion upholding the removal restrictions in the Ethics in Government Act as a constitutionally permissible infringement upon the executive branch. A disturbing explanation of his position is that as Chief Justice, Rehnquist possessed the power under the Act to select the members of the special division of the D.C. Circuit that would control all independent counsel investigations and prosecutions. Thus, the Chief Justice arguably had a strong interest in upholding the constitutionality of the Act. Although we in no way mean to suggest that this motivation actually underlay the Chief Justice's authorship of *Morrison*, it does serve to illustrate that the Supreme Court's pronouncements about its own power relative to the other two branches may be subject to greater skepticism than its opinions in any other area of constitutional law.

41. *See* AGRESTO, *supra* note 34, at 10, 93, 152; PAUL BATOR ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 363 (2d ed. 1973); BICKEL, *supra* note 36, at 240; MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* 125-26 (1982);

Therefore, whatever one's conclusion in other areas of constitutional law, we think the case for coordinate constitutional review is especially powerful in the separation of powers area. We think that in this area the concurrence of all three branches of the federal government is necessary on the proper allocation of a particular power before that matter may properly be regarded as settled.⁴²

To further elaborate, we think that the case for departmental or coordinate review is arguably at *its strongest* when that power is being asserted defensively to protect presidential powers from encroachment by Congress and the courts.⁴³ Professor William Van Alstyne once noted that the narrowest and least controversial understanding of the power of judicial review announced in *Marbury* was its assertion as a defensive power when Congress sought unconstitutionally to alter the Supreme Court's original jurisdiction.⁴⁴ Similarly, here, a 208-year old presidential tradition of defensive presidential review to protect presidential power against congressional encroachments seems especially defensible. This is particularly the case since substantial historical evidence suggests that the Framers gave the President major constitutional powers (like the veto power) in part to enable and encourage him to defend the prerogatives of his office and with them the constitutionally mandated separation of powers.

Accordingly, if one accepts *any* role for the policy making branches in constitutional interpretation, and all but the most die-hard judicial supremacists do,⁴⁵ then this seems like an especially

Brest, *Congress as Constitutional Decisionmaker*, *supra* note 34, at 103; Cox, *supra* note 37, at 260; Jonathan L. Entin, *Separation of Powers, the Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L.J. 175, 218-23 (1990) [hereinafter Entin, *Separation of Powers*]; Fisher, *Constitutional Interpretation*, *supra* note 37, at 744; Merrill, *Judicial Opinions*, *supra* note 34, at 45.

42. See FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 26, at 243-44; Fisher, *Constitutional Interpretation*, *supra* note 37, at 716-17, 746; Michael J. Glennon, *The Use of Custom in Resolving Separation of Powers Disputes*, 64 B.U. L. REV. 109, 139-41 (1984).

43. We realize, of course, that many will deny that Presidents are *defending* turf here, since our conclusion in that regard presumes that the Framers meant to create a strongly unitary executive. We do presume that for reasons that have been amply explained in prior writings, and we ask here whether any contrary practice has grown up that would trump the original understanding. The *absence* of such a contrary practice suggests, if anything, that we are right about the original history and that Professors Lessig, Sunstein, and Flaherty are wrong. It would be very difficult indeed to argue that for 208 years from George Washington to George Bush presidents have always uniformly asserted a view of presidential power that was both rejected by the Framers and that was at odds with the constitutional text!

44. See Van Alstyne, *supra* note 34, at 34.

45. The most famous dicta expressing the judicial supremacy position was announced

easy context in which to recognize that a consistent presidential interpretation of the law execution power as including at least a power of removal is deserving of deference. Especially since Congress and the Supreme Court have reached inconsistent resolutions on this issue, it would seem that deference to the President's consistent and vigorous interpretation of the scope of the removal power is appropriate.

Not every presidential claim of executive power deserves to be given weight by all who believe in the legitimacy of three-branch construction of the constitution. Some presidential assertions of power are extraordinary and are associated with unusual Presidents or unusual national crises that seemed to require an extraordinary response. We deal here with a claim of presidential power that is as old as the Republic and that has been asserted to one degree or another by virtually *every* occupant of the presidential office. That kind of a *defensive claim* about the scope of presidential power does deserve the attention of those who believe in three-branch constitutional review. Accordingly, the theory that underlies such review further buttresses the relevance of the historical discussion that follows.

Embracing the use of coordinate construction in at least some separation of powers disputes still leaves one critical consideration unaddressed. As Professor Gary Lawson has pointed out, all theories of constitutional interpretation must, in addition to defining the legal standard that is being applied, also specify the amount of evidence needed to establish when that standard is met.⁴⁶ The Supreme Court provided one possible evidentiary standard in *United States v. Midwest Oil Co.* when it suggested that a "long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [executive actions] had been made in pursuance of its consent or of a recognized administrative power of the Executive."⁴⁷ As Justice Frankfurter subsequently elaborated, "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged

in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), which proclaimed that "the federal judiciary is supreme in the exposition of the law of the Constitution." Subsequent cases referred to the "responsibility of this Court" as the "ultimate interpreter of the Constitution." See *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Powell v. McCormack*, 395 U.S. 486, 549 (1969); *United States v. Nixon*, 418 U.S. 683, 704 (1974).

46. See Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 859 (1992).

47. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915).

in by the Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive power' vested in the President by § 1 of Art. II."⁴⁸

If such is the standard for evaluating congressional acquiescence to executive assertions of power, it logically follows that a converse standard should apply in evaluating presidential acquiescence to congressional assertions of power. Presidents should not be deemed to have acquiesced to a congressionally-imposed limitation on their power unless "a systematic, unbroken, [congressional] practice" of limiting the President's power existed that had been "long pursued to the knowledge of the [Presidents] and never before questioned." And since the burden of proof logically must lie upon the party asserting the existence of such a practice, the failure to prove the existence of such a continued, open, and unquestioning acquiescence on the part of the President would necessarily imply that the propriety of such a congressionally-enacted limitation on the President's power would have to be regarded as an unresolved question still subject to interpretation by all three branches. It is in this context that the Supreme Court's statements in *Chadha* referred to above are most relevant. In *Chadha*, the Court declined to regard the legislative veto as an established practice because eleven of thirteen Presidents from Woodrow Wilson to Ronald Reagan had objected to it, and the Court instead decided the constitutional issue on purely textual, structural, and normative grounds.

The Frankfurter "gloss on the text" standard helps resolve several practical questions. First, Frankfurter's test requires the existence of a "systematic, unbroken . . . practice." This suggests that an occasional presidential failure to object to a particular infringement on the President's authority should not be sufficient to constitute acquiescence for all time and on behalf of all future Presidents in a particular constitutional construction. Transient political pressures or time constraints should not be allowed to

48. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring); *see also* *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) ("[P]ractice and acquiescence under it for a period of several years, commencing with the organization of the judicial system . . . has indeed fixed the construction."); *Myers v. United States*, 272 U.S. 52, 163 (1926); *Dames & Moore v. Regan*, 453 U.S. 654, 668-69, 686 (1981) (noting "the history of [congressional] acquiescence in executive claims settlement," the Court held that "Congress may be considered to have consented to the President's action in suspending claims").

determine major constitutional issues⁴⁹ and Presidents should not be forced into wasting valuable time and political capital scrutinizing every piece of legislation for even the most minor incursions on Article II prerogatives. Moreover, Frankfurter's requirement that the practice be "long pursued" ensures that the important questions surrounding the proper allocation of the federal powers among the three branches is not determined by the weaknesses or idiosyncrasies of a handful of Presidents.⁵⁰ Finally, Frankfurter's requirement that the branch in question have full knowledge of the infringement in question guarantees that mere inattention will not be construed as active acquiescence.

Applying these principles, we will now examine in this four Article series statements made by each President from George Washington through George Bush to determine whether our nation's Chief Executives can fairly be said to have acquiesced in an anti-unitarian vision of the executive branch.⁵¹ We begin in this first installment with Presidents Washington, Adams, Jefferson,

49. For example, the exigencies of World War II led Franklin Roosevelt to sign the Lend-Lease Act even though he believed that the legislative veto provision it contained was unconstitutional. See Robert H. Jackson, *A Presidential Legal Opinion*, 66 HARV. L. REV. 1353 (1953). Such short-term political considerations are surely a weak basis for defining the scope of a major constitutional issue such as the separation of powers. See JOHN R. BOLTON, *THE LEGISLATIVE VETO: UNSEPARATING THE POWERS* 10-13 (1977); Glennon, *supra* note 42, at 141-42; Kmiec, *supra* note 37, at 348. But see Rappaport, *supra* note 37, at 771-76 (arguing that the President has a constitutional obligation to veto unconstitutional laws).

50. In fact, some scholars have argued that historical acquiescence by earlier Presidents cannot be dispositive no matter how long standing. See Kmiec, *supra* note 37, at 357 ("Later presidents cannot be estopped from returning to the original understanding [of the Constitution].").

51. Given this aim, this Article will primarily focus on statements made by the Presidents. Positions taken by Congress and the judiciary will be discussed only in passing, as will the eventual resolution of particular disputes. The key to the analysis is whether the positions taken by the Presidents asserted the unitariness of the executive branch, not whether those assertions were opposed or were successful.

Because of space constraints, this Article will limit its discussion for the most part to statements made by the Presidents themselves, including veto messages, signing statements, legislative proposals, and statements regarding previously enacted legislation. This is not to say that an analysis of other executive materials would not be appropriate. See Glennon, *supra* note 42, at 140. We omit extended discussion of statements offered by lower-level executive officials (such as those embodied in the arguments offered by the Attorneys General and the Solicitors General before the Supreme Court, the opinions of the Attorneys General, testimony before Congress, among others) simply because undertaking a comprehensive survey of those documents would constitute another monumental undertaking. To the extent that our research has exposed us to the views offered by subordinate executive officials, we have found that those views largely corroborated our conclusions.

Madison, Monroe, John Quincy Adams, and Jackson. The conclusion of our four Article series is that, contrary to the misconceptions of many anti-unitarians, *no* systematic, unbroken, long-standing practice exists of presidential acquiescence to congressionally-imposed limitations on the President's sole power to execute the laws and remove subordinate officials. On the contrary, the historical record shows that Presidents almost always object or fight when Congress trespasses on their constitutional power to execute the laws free from legislative control. The few exceptions that do exist are neither significant enough nor sustained enough to constitute Frankfurterian acquiescence. Thus, it is clear that, Professor Flaherty's assertions notwithstanding, no reasonable Burkean common law constitutionalist could conclude that history and practice resolves the unitary executive debate in Congress's favor. That debate must be resolved in the President's favor on textual, structural, originalist, and normative grounds.

III. THE UNITARY EXECUTIVE DURING THE EARLY YEARS OF THE REPUBLIC, 1787-1837

The first half-century of the Republic was a critical time in the development of our constitutional system. Although the Framers chose to create an independent, co-equal, and strongly unitary executive branch of government, many of the issues surrounding the distribution of powers among the three branches of the federal government were not directly addressed in the Constitution.⁵² Many in Congress recognized, however, from the very beginning that the Constitution gave to the President the sole power to remove executive officials, and this recognition was reflected in the famous so-called Decision of 1789.⁵³ Thereafter, every single Pres-

52. For the purposes of this Article, it is sufficient to note that the Framers specifically considered and rejected proposals to divide the executive power among multiple Presidents, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 65-66, 88-89, 96-97 (Max Farrand ed., 1966), or between the President and a council of revision or a council of state, 1 *id.* at 97-98, 138-40; 2 *id.* at 73-80, 298, 541-42; 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 159, 164, 214, 243, 257, 292 (J. Elliott ed., 1866) (photo. reprint 1941). Thus it is generally conceded that "[n]o one denies that in some sense the framers created a unitary executive; the question is in what sense." Lessig & Sunstein, *supra* note 6, at 8. For a more complete analysis of the Framers' support for the unitary executive, see Calabresi & Prakash, *supra* note 3, at 603-35.

53. Since the Decision of 1789 represents a legislative construction of the Constitution, it falls outside the scope of this Article. Fortunately, several definitive treatments of the Decision of 1789 exist. See JAMES HART, THE AMERICAN PRESIDENCY IN ACTION: 1789,

ident who served between 1789 to 1837 consistently objected to all congressional attempts to limit the President's power to control the execution of the laws. In fact, the executive branch was so successful in resisting these challenges that by 1837, both the friends and enemies of presidential power over law execution agreed that the matter had been conclusively settled in the President's favor by practice.

This settled practice of constitutionally vested presidential power over removals followed importantly from the Framers' decision to make the executive branch as independent of the legislature, and as nearly co-equal to it, as was practicable. This decision was manifested not only in the Framers' choice of the Electoral College as the mechanism by which Presidents would, at least initially be selected, but also by their decision to give the President the independence that can only come with a fixed term in office.⁵⁴ Ideas about how to select the President varied at the Philadelphia Convention, but there was broad support for presidential independence buttressed by a long fixed term in office.⁵⁵ In fact, during the

155-248 (1948); CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY 1775-1789*, 141-65 (1923). Of particular note is both Chief Justice Taft's reliance on the Decision of 1789 as establishing the President's power to remove and Justices McReynolds's, Brandeis's, and Holmes's criticism of that reliance in *Myers v. United States*, 272 U.S. 52 (1926). Professor Calabresi and Sai Prakash have offered their own analysis. See Calabresi & Prakash, *supra* note 3, at 642-45. For other contemporary treatments, see Casper, *Early Practices*, *supra* note 8, at 233-43; David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. CHI. L. SCH. ROUNDTABLE 161, 195-203 (1995) [hereinafter Currie, *First Congress and Structure*]; Greenfield, *supra* note 16, at 82-111.

Briefly stated, the initial draft of the bill to establish the Department of Foreign Affairs provided that the Secretary of Foreign Affairs was "to be removable from office by the President of the United States." Concerned that this language suggested that the power to remove the Secretary was conferred by congressional rather than constitutional grant, Representative Egbert Benson offered an amendment to this language to remove this implication. This amended language was subsequently incorporated into the statutes creating the War Department (without much controversy) as well as the Treasury Department (by the narrowest of margins: the casting vote of Vice President Adams). Congress's action has been thereafter regarded as recognizing the constitutional basis of the President's removal power.

54. Executive officials in parliamentary regimes lack such protections because they can be unseated by a vote of no confidence in the legislature. For this reason, Arend Lijphart identifies the fixed term of office as a key and sometimes advantageous feature of presidential regimes. See Arend Lijphart, "Introduction," *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT* 1, 11-12 (Arend Lijphart ed., 1992).

55. Gouverneur Morris, for example, was indifferent how the executive was chosen so long as he had the independence that comes with a long term in office. Similarly, Dr. McClurg favored tenure during good behavior for the President thinking "the independence of the Executive to be equally essential with that of the Judiciary Department." 3 PHILIP

period at Philadelphia when the Framers were contemplating legislative selection of the President, they also were contemplating reinforcing his independence with a fixed term longer than four years. Thus, when Theodore Lowi implies, wrongly in our view, that the Framers expected that the Electoral College would ordinarily fail to produce a winner and that Presidents would thus be selected in the House of Representatives, he overlooks the fact that those selected would still be independent due to their fixed term in office.⁵⁶ He also overlooks the unintended consequences of the Incompatibility Clause, which in practice has greatly reinforced the separation of powers to the great benefit of the presidency.⁵⁷

Presidential power and independence of the legislature were thus critical elements of the Founders' plan, and they were reflected from the Decision of 1789 on in the practice of our first seven Presidents, all of whom asserted a power to control law execution and to remove officials as part of their understanding of the executive's constitutionally granted prerogatives. We turn now to an elaboration of their views.

A. George Washington

George Washington's strong support for the unitary executive had very deep roots and grew out of events that occurred long before he became the first President of the United States. In particular, Washington's views were greatly shaped by his experiences during the Revolutionary War when several committees of the Continental Congress served as the army's plural executive head.⁵⁸ These ineffective multiple committees led Washington to plead throughout the war for the creation of a single executive structure that would have the power and the duty to "act with dispatch and energy."⁵⁹ Washington complained repeatedly about "the inconve-

B. KURLAND & RALPH LERNER, *THE FOUNDERS CONSTITUTION* 495 (1987).

56. See THEODORE J. LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* 33-35 (1985). Lowi argues quite wrongly that the Framers' system was going to make the presidency "an essentially parliamentary office." *Id.* at 34.

57. See Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?* 79 CORNELL L. REV. 1045 (1994).

58. See GLENN A. PHELPS, *GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM* 142-43 (1993); see also *id.* at 56 (noting that during 1779-1780, Washington supported efforts to create a "strong executive branch, preferably with individual executives capable of accepting and exercising political responsibility").

59. Letter from George Washington to Joseph Jones (May 14, 1780), in 18 *THE WRITINGS OF GEORGE WASHINGTON*, 356, 356-57 (John C. Fitzpatrick ed., 1939), quoted in PHELPS, *supra* note 58, at 59.

nience of depending upon a number of men and different channels" for supplies.⁶⁰ As Glenn Phelps notes, once Robert Morris was appointed Commissary General in 1781, his "success in supplying the army in those crucial months [before Washington's victory at Yorktown] only reinforced Washington's bias in favor of strong, independent executive leadership."⁶¹

Washington was also greatly frustrated during the War for Independence by the astonishing lack of a unified command structure. The Northern Army, for example, was commanded by Philip Schuyler, a New Yorker whose strong political support from that state allowed him, in Phelps's words, to "behave[] more like an equal than a subordinate," forcing Washington to plead with Schuyler to provide support for his efforts.⁶² Moreover, the Continental Congress also appointed Washington's field generals, thus effectively giving those generals some degree of independence. As a result some of Washington's nominal subordinates spent their time catering to the interests of their congressional patrons with the result that they failed to follow Washington's orders promptly, if ever.⁶³ All of these experiences led Washington to support strongly the creation of a "strong, independent, and energetic executive" at the Philadelphia Convention.⁶⁴

Once the unitary presidency had been established, Washington was determined as the first President to give it structure and life both through his actions and through his public and private utterances. Washington noted during the opening months of his Administration that in his view, other executive officials existed only because it was "impossib[le] [for] one man . . . to perform all the great business of the State," and thus the proper role for these officials was merely "to assist the supreme Magistrate in discharg-

60. PHELPS, *supra* note 58, at 143 (quoting 1 THE PAPERS OF GEORGE WASHINGTON: THE REVOLUTIONARY WAR SERIES 84). As Washington later noted, "wherever, and whenever one person is found adequate to the discharge of a duty by close application thereto it is worse executed by two persons, and scarcely done at all if three or more are employed therein." Letter from George Washington to the Secretary of War (September 24, 1792), in 32 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 159, 160, *quoted in* LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 91 (1948) [hereinafter WHITE, THE FEDERALISTS].

61. PHELPS, *supra* note 58, at 143; *see also id.* at 59.

62. *Id.* at 144.

63. *Id.* Washington's command of his forces was further undermined by the fact that the militia officers that were part of his forces were primarily responsible to their state's governors, not to him. *See id.* at 144-45.

64. *See id.* at 103-04.

ing the duties of his trust.”⁶⁵ As noted by Leonard White, the preeminent administrative law historian of this period, “The President looked upon the Secretaries . . . as *assistants*, not as rivals or as substitutes.”⁶⁶

Washington’s determination to take control of the entire administration was demonstrated immediately after his swearing in when he asserted control over the executive structures that were left over from the government set up under the Articles of Confederation. Thus, even before the new Cabinet Departments were created, and even before Secretaries had been appointed to direct them, Washington was already personally taking control of *all* executive structures and entities within the government. A mere five days after Washington’s inauguration the President asked Acting Secretary of War Henry Knox to examine and provide a summary report on papers regarding a treaty with the Cherokee Indians that he was forwarding to Knox.⁶⁷ And, a little over one month later, Washington asked the Board of Treasury, the Acting Postmaster General, and the Acting Secretaries of War and Foreign Affairs to prepare a written report that would provide him with “an acquaintance with the real situation of the several great Departments” and a “full, precise, and distinct *general idea* of the affairs of the United States” connected with their particular departments.⁶⁸ As James Hart has noted, these letters were notable for “the clear conception he had of the presidential function of over-all administrative management.”⁶⁹

After the great Cabinet Departments had been created, and after the initial Cabinet Secretaries had been appointed, Washington continued to exercise close supervision over the affairs of the executive branch. Again and again, he involved himself with the day-

65. Letter from George Washington to Elenor Francois Elie, Comte de Moustier (May 25, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 333, 334, *quoted in* WHITE, THE FEDERALISTS, *supra* note 60, at 27, and Calabresi & Prakash, *supra* note 3, at 637.

66. WHITE, THE FEDERALISTS, *supra* note 60, at 27.

67. See Letter from George Washington to the Acting Secretary of War (May 9, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 313, 313, *cited in* HART, *supra* note 53, at 134.

68. Letter from Washington to the Acting Secretary for Foreign Affairs (June 8, 1789), in 30 WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 343, 344; *id.* at 344 n.30 (editor noting that similar letters were sent to the Acting Secretary of War, the Board of the Treasury, and the Acting Postmaster General); see also HART, *supra* note 53, at 135; Calabresi & Prakash, *supra* note 3, at 637 & n.425, 651 n.503.

69. HART, *supra* note 53, at 135.

to-day affairs of the various Cabinet Departments. Leonard White notes that "contacts between the President and his department heads were close and unremitting" and they included "hundreds of written communications and records of oral consultation."⁷⁰ He describes Washington's contacts as including: the "*approval of plans or actions* which had been submitted to him in writing," the conveying of "*directions* concerning administrative operations," the making of requests to his department heads (including Treasury Secretary Alexander Hamilton) for "*opinions on the constitutionality of acts of Congress*," and the making of requests for his Secretaries "*opinions on policy questions*, foreign and domestic alike."⁷¹ Washington also reviewed all correspondence prepared by cabinet officials.⁷² "By this means," Jefferson noted, Washington was "always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever department they related; he formed a central point for the different branches; [and] preserved a unity of object and action among them."⁷³

In fact, Washington was ever watchful for exercises of executive power outside his direct supervision. When a private citizen named Rosencrantz participated in certain treaty negotiations, Washington sharply inquired:

Who is Mr. Rosencrantz? And under what authority has he attended the councils of the Indians at Buffalo Creek? Subordinate interferences must be absolutely interdicted, or counteraction of the measure of Governm[en]t, perplexity and confusion will inevitably ensue. No person should presume to speak to the Indians on business of a public nature except those who derive their Authority and receive their instructions from the War Office for that purpose.⁷⁴

70. WHITE, *THE FEDERALISTS*, *supra* note 60, at 32.

71. *Id.* at 32-33; *see also id.* at 106-07; Calabresi & Prakash, *supra* note 3, at 638 & nn.427-428.

72. On June 4, 1789, Washington began to read and make abstracts of correspondence between Jefferson, who was then serving as Minister to France, and Secretary for Foreign Affairs John Jay, in the process "beginning a practice which Washington continued, more or less throughout his presidency." 30 *THE WRITINGS OF GEORGE WASHINGTON*, *supra* note 59, at 343 n.29 (editorial note), *quoted in* HART, *supra* note 53, at 135; *see also* Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075 (1986); Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 485.

73. McDONALD, *AMERICAN PRESIDENCY*, *supra* note 20, at 226 (quoting Memorandum from Jefferson to the Heads of Departments (Nov. 6 1801)).

74. Letter from George Washington to the Secretary of War (Aug. 15, 1792), *in* 32

Washington deployed many tools in his never-ending quest to administer the Executive Branch of the Government in an orderly fashion. One of the tools plainly and willingly employed was the removal power. Washington exercised his removal power vigorously in at least seventeen civil cases, as well as removing six military officers.⁷⁵ Leonard White notes that it is difficult to determine the number of removals, especially since there are no records with respect to inferior officers, but it is clear that Washington removed "three foreign ministers, Monroe, Carmichael, and Thomas Pinckney (at his request)" as well as "two consuls, eight collectors, and four surveyors of internal revenue."⁷⁶ In addition, Secretary of State Edmund Randolph's resignation under charges of misconduct "was in effect a removal."⁷⁷

Thus, Washington clearly conducted his administration in a manner that realized the unitary vision of the executive branch. As White so aptly observes:

All major decisions in matters of administration and many minor ones were made by the President. No department head, *not even Hamilton*, settled any matter of importance without consulting the President and securing his approval. All of them referred to the President numerous matters of detail as well as large and many small issues of administrative policy. . . . Washington accepted full responsibility as a matter of course, and throughout the eight years of his service there is no indication of a tendency to consider department heads other than dependent agencies of the Chief Executive.⁷⁸

Other historians concur with White's assessment. Rexford Tugwell notes Washington firmly rendered the department heads "his subordinates and separated them from the Congress."⁷⁹ Tugwell further

THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 115, 116-17, *quoted in* PHELPS, *supra* note 58, at 146, and WHITE, *supra* note 60, at 33.

75. *See* WHITE, THE FEDERALISTS, *supra* note 60, at 285.

76. *Id.*

77. *Id.* at 288; *see also id.* at 170-72; PAUL P. VAN RIPER, HISTORY OF THE UNITED STATES CIVIL SERVICE 19 (1958) (citing CARL R. FISH, THE CIVIL SERVICE AND THE PATRONAGE 13 (1905)).

78. WHITE, THE FEDERALISTS, *supra* note 60, at 27 (emphasis added).

79. REXFORD G. TUGWELL, THE ENLARGEMENT OF THE PRESIDENCY 43 (1960), *quoted in* Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 485 n.8 (1988).

notes that Washington's principle of administration was "that the Executive Branch of the government was one whole to be managed by the President alone,"⁸⁰ and that presidential control over law execution was to "remain the rule until . . . Andrew Johnson's Presidency, when the Congress would assert its superiority by seizing the removal power it had allowed Washington to exercise without protest."⁸¹ Finally, Glenn Phelps concludes that "Washington's presidency reflected [a] concern for administrative centralization. There would be no divided responsibility or ambiguity as to who was the chief executive."⁸²

This is not to say that Washington did not place a great deal of trust in his advisers. As James Hart observes, "As an administrator Washington made the final decisions, but only after exercising his best judgment in the light of the views of advisers."⁸³ Whenever possible, Washington paid due respect to the prerogatives of his subordinates and avoided interfering with the details of how each department head managed his responsibilities.⁸⁴ For example, when a representative of the French government asked to meet with Washington directly, Washington demurred, countering that as a matter of policy governments function best when such contacts were channeled through the appropriate department head.⁸⁵ Thus, as Glenn Phelps points out:

[Washington's trust in his advisers was] perfectly consistent with his own long-held notions of administrative centralism. No matter how much discretion he chose to delegate to his subordinates Washington always held the reins of responsibility very tightly. Although he remained aloof from the details of government operations he insisted that his department heads inform him of every aspect of their daily activities, especially with regard to how their actions might affect his own authority.⁸⁶

80. TUGWELL, *supra* note 79, at 134-35.

81. *Id.* at 43.

82. PHELPS, *supra* note 58, at 145, *quoted in* Calabresi & Prakash, *supra* note 3, at 638.

83. HART, *supra* note 53, at 134; *see also* WHITE, THE FEDERALISTS, *supra* note 60, at 27 n.4 ("Washington . . . took full advantage of [the department heads'] counsel and was deferential to their views.").

84. *See* WHITE, THE FEDERALISTS, *supra* note 60, at 30-31.

85. *See* Letter from George Washington to Eleonor Francois Elie, Comte de Moustier, *supra* note 59, at 334, *cited in* WHITE, THE FEDERALISTS, *supra* note 60, at 31.

86. PHELPS, *supra* note 58, at 146; *see also* Calabresi & Prakash, *supra* note 3, at

Notwithstanding Washington's clear assertion of control over the entire executive branch, some scholars have persisted in pointing to certain congressional actions that they suggest constitute deviations from the unitary executive. First, these scholars claim that in establishing the Treasury Department and the Post Office, Congress failed to designate them as "executive" departments.⁸⁷ With regard to the Treasury Department, these scholars also point out that the statute failed to include a provision explicitly providing that the Treasury Secretary "shall conduct the business of the . . . department in such manner as the President of the United States shall from time to time order or instruct,"⁸⁸ required that the Treasury Secretary submit reports directly to Congress,⁸⁹ and required that appropriations warrants be signed by the Secretary and countersigned by the Comptroller.⁹⁰ Together, these factors cause some to believe that the Treasury Department and the Post Office as originally constituted were inconsistent with a unitary executive branch.⁹¹

Whether Congress regarded the differences in the statutes creating the Departments of Foreign Affairs, War, and the Treasury as being significant is far from clear.⁹² However, it is crystal clear

638.

87. *Compare* An Act to Establish the Treasury Department, ch. 12, sec. 1, 1 Stat. 65, 65 (1789), *and* An Act for the Temporary Establishment of the Post-Office, ch. 16, sec. 1, 1 Stat. 70, 70 (1789) *with* An Act for Establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, sec. 1, 1 Stat. 28, 28-29 (1789) *and* An Act to Establish an Executive Department, to be denominated the Department of War, ch. 7, sec. 1, 1 Stat. 49, 49-50 (1789).

88. *Cf.* sec. 1, 1 Stat. at 29; sec. 1, 1 Stat. at 50.

89. Sec. 2, 1 Stat. at 66.

90. Sec. 4, 1 Stat. at 66.

91. This thesis was first laid out over 50 years ago, and has periodically resurfaced ever since. *See* Casper, *Early Practices*, *supra* note 8, at 240-42; Ledewitz, *supra* note 21, at 792-93; Lessig & Sunstein, *supra* note 6, at 27-30, 71-72; Peter Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 615-16 (1989); Tiefer, *supra* note 21, at 70-76.

92. The significance of Congress's failure to refer to Treasury as an "executive" department is belied by the fact that nine days after creating that department, Congress passed the Salary Act, which established for "the Executive Officers of Government," including both the Secretary and the Comptroller of the Treasury. Act of Sept. 11, 1789, ch. 13, sec. 1, 1 Stat. 67, 67; *see also* Calabresi & Prakash, *supra* note 3 at 648.

It is also far from clear that the absence of a specific provision authorizing presidential direction of the Treasury Secretary supports any negatively-implied limits on presidential control. Such silence is more properly viewed as ambiguous. Calabresi & Prakash, *supra* note 3, particularly in light of the fact that Washington did not hesitate to issue

that Washington must have regarded the differences in statutory language as inconsequential because he asserted firm control over the Treasury Department throughout his Presidency. As noted earlier, Washington included the Board of Treasury along with the other extant carry-over departments when requesting information shortly after assuming office. Washington also advised Hamilton extensively on the structure of the Treasury Department, suggesting which positions should be established and how much the compensation for those positions should be.⁹³

Washington effectively placed the Treasury Department under his firm control when he nominated Alexander Hamilton to be the first Secretary of the Treasury. Hamilton was one of the strongest defenders of executive power, energy, *and unity* during the founding era.⁹⁴ Equally importantly, Hamilton was personally very loyal to Washington having served as his aide during the Revolutionary War.⁹⁵ So deep was Washington's faith in Hamilton's loyalty that Washington was later to insist during the Adams Administration that he would only agree to serve as Commander-in-Chief of a reactivated army if Hamilton was his second in command. After a lengthy stalemate with Adams, who resented Hamilton as a rival, the second president gave in and agreed to let Washington have his most loyal and preferred aide in the number two military spot. In sum, as a practical matter, Washington's selection of Hamilton as the first head of the Treasury Department rendered nugatory *any* independence the Treasury Department might have had. As Leonard White notes, Hamilton's "loyal acceptance of Washington's primacy and his theoretical view of the status of a department head precluded any attempt on his part" to assert policies independent of Washington.⁹⁶ Thus, although Hamilton undoubtedly did have a

"orders" to Hamilton that Hamilton unhesitatingly followed. *See id.* at 651.

Finally, the fact that the Comptroller had to countersign warrants for money did not necessarily imply independence from the Treasury Secretary and certainly did not necessarily imply independence from the President. *See id.* at 654 n.521.

93. Letter from George Washington to the Secretary of the Treasury (Mar. 15, 1791), in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 233, 234-49; *see also* WHITE, THE FEDERALISTS, *supra* note 60, at 33; Calabresi & Prakash, *supra* note 3, at 651 n.503.

94. *See* WHITE, THE FEDERALISTS, *supra* note 60, at 89-92.

95. *See* RICHARD BROOKHISER, FOUNDING FATHER: REDISCOVERING GEORGE WASHINGTON 165-66 (1996).

96. WHITE, THE FEDERALISTS, *supra* note 60, at 29; *see also id.* at 27. Other historians concur. *See, e.g.*, FORREST McDONALD, THE PRESIDENCY OF GEORGE WASHINGTON 65 (1974) [hereinafter McDONALD, PRESIDENCY OF WASHINGTON] ("In administrative matters

direct influence on early fiscal legislation,⁹⁷ as Glenn Phelps notes, “If [Washington] chose not to rein in Hamilton . . . it was because Hamilton’s plans for the federal government conformed perfectly well with his own,”⁹⁸ and not because the Treasury Secretary was in any way independent of the President.

It is also far from clear that Congress’s failure to denominate the Post Office as an “executive” department is in any way significant. As David Currie notes, the initial organic statute of the Post Office was a hurriedly-created temporary measure.⁹⁹ Moreover, that statute explicitly made the Postmaster “subject to the direction of the President.”¹⁰⁰ And more importantly for the purposes of this Article, regardless of what Congress thought, Washington never doubted that he possessed the authority to control the Post Office. Within the opening months of his administration, after inspecting the report he had requested from the Post Office, Washington further requested that the Acting Postmaster General send him “*in detail*, the receipts and expenditures of the Post Office” for 1784 and 1788 so that Washington could “know the causes of the decrease of the income” that had taken place during that time.¹⁰¹ Two weeks later, Washington wrote again, indicating that “there still remains one point on which I would wish to have further information”: whether the annual profit of \$39,985 “has been lodged in the Treasury of the United States, or appropriated to the use of the Post Office Department.”¹⁰² Washington also reviewed contracts that the Postmaster General had negotiated regarding the carriage of the mail, on one occasion “tak[ing] the matter into consideration” and promising to let the Postmaster General know “*his determination upon it*” at a later time.¹⁰³ And any remaining

that were clearly executive [such as] the short-range borrowing and disbursal of funds . . . Hamilton continued to report directly as a subordinate and to act only upon orders from [Washington].”).

97. See Casper, *Early Practices*, *supra* note 8, at 241; Currie, *First Congress and Structure*, *supra* note 53, at 190 n.196.

98. PHELPS, *supra* note 58, at 146.

99. See Currie, *First Congress and Structure*, *supra* note 53, at 203.

100. Act Establishing the Post Office, sec. 1, 1 Stat. at 70, *cited in* Currie, *First Congress and Structure*, *supra* note 53, at 203.

101. Letter from George Washington to the Acting Postmaster General (July 3, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 352, 352-53, *quoted in* HART, *supra* note 53, at 136, *and* Calabresi & Prakash, *supra* note 3, at 657.

102. Letter from George Washington to the Acting Postmaster General (July 17, 1789), *in* 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 356, 356, *quoted in* HART, *supra* note 53, at 136.

103. Letter from George Washington to the Postmaster General (Aug. 29, 1791), *in* 31

doubts about the extent of the control that Washington exerted over the Post Office were eliminated when he transferred the Post Office into the Treasury Department in 1791, and subsequently declined in 1792 to support removing the Post Office into the State Department.¹⁰⁴ Thus, Washington plainly asserted the power to direct the officers of *all* the executive departments, including the Treasury Department and the Post Office.

Still other scholars have pointed out that the First Congress did not centralize the authority to control the U.S. Attorneys under any single subordinate executive official, and that state officials were empowered by the early statutes to conduct federal prosecutions as well. They go on to suggest that the absence of a single, subordinate executive officer with authority to control federal litigation is inconsistent with the unitary theory of the executive.¹⁰⁵

This position too fails to find any support in the practices of the Washington Administration, since Washington clearly believed that he had plenary authority to control all federal prosecutions. On several occasions, even though Congress had not yet at that time centralized control of federal prosecutions under any particular subordinate executive official,¹⁰⁶ Washington directed various federal district attorneys in the exercise of their prosecutorial discretion. Thus, Washington wrote the United States Attorney for the Pennsylvania District saying that he thought two individuals recently indicted for riot were innocent and that he "therefore thought fit to instruct you forth with to enter a *Nolle prose qui on the indictment aforesaid*: and for so doing let this be filed as your warrant."¹⁰⁷ Washington also "[d]irected the Att[orne]y Gen[eral] [] to

THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 348, 348 (emphasis added).

104. See *id.* in 31 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 349, cited in WHITE, THE FEDERALISTS, *supra* note 60, at 30-31; see also Calabresi & Prakash, *supra* note 3, at 657 & n.535.

105. See Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275 (1989) [hereinafter Krent, *Executive Control*]; Krent, *Fragmenting*, *supra* note 13; Lessig & Sunstein, *supra* note 6, at 15-20; Tiefer, *supra* note 21, at 74-75.

106. See WHITE, THE FEDERALISTS, *supra* note 60, at 166-68; Bloch, *supra* note 16, at 567; Krent, *Executive Control*, *supra* note 105, at 286-87; Lessig & Sunstein, *supra* note 6, at 16-17; Tiefer, *supra* note 21, at 74-75; James R. Harvey III, Note, *Loyalty in Government Litigation: Department of Justice Representation of Agency Clients*, 37 WM. & MARY. L. REV. 1569, 1578 (1996). Washington did present Attorney General Edmund Randolph's request for supervisory authority over the district attorneys to Congress, but the Senate rejected this proposal. WHITE, THE FEDERALISTS, *supra* note 60, at 167; Bloch, *supra* note 16, at 585-88; Calabresi & Prakash, *supra* note 3, at 658 n.542; Harvey, *supra*, at 1578 n.52.

107. Letter from George Washington to William Rawle (Mar. 13, 1793), in 32 WRIT-

instruct the District Attornies to require from the Collectors of the several Ports, within them, information of all infractions of neutrality that may come within their purview at the different ports, requiring the interposition of Government, particularly as to building and equipping Vessels for War.”¹⁰⁸ Asking that a *subordinate* officer be given control over all federal litigation in no way suggested that the President lacked the authority to control all prosecutions even if no such subordinate officer were given such powers.¹⁰⁹

Washington also sought help subject to presidential guidance and direction from *state* as well as *federal* officials in their enforcement of federal law during the Whiskey Rebellion.¹¹⁰ At first relying on his powers of suasion, Washington invoked his duties under the Take Care Clause in asking state courts and executives to use their weight and influence to bring the rebels to justice.¹¹¹ More specifically:

[Washington] *charge[d] and require[d]* all Courts, Magistrates and Officers whom it may concern, according to the duties of their several offices, to exert the powers in them respectively vested by law for the purposes aforesaid, hereby also enjoining and requiring all persons whomsoever, as they tender the welfare of their country, the just and due authority of government and the preservation of the public peace, to be aiding and assisting therein according to law.¹¹²

When these efforts failed, Washington assumed command of the state militias even though those troops nominally fell under the jurisdiction of the states.¹¹³ As Glenn Phelps notes, “[O]nce mobi-

INGS OF GEORGE WASHINGTON, *supra* note 59, at 386, 386 (emphasis added).

108. *Journal of the Proceedings of the President* (May 10, 1793), in 32 WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 455 n.35 (emphasis added). Both the Attorney General and the Secretary of State entered numerous other requests for specific actions with regards to prosecutions. See WHITE, THE FEDERALISTS, *supra* note 60, at 407-08 & n.10.

109. See Calabresi & Prakash, *supra* note 3, at 659 & n.547.

110. For a comprehensive discussion of the Framers' views on the President's ability to direct state officials' execution of federal law, see Saikrishna B. Prakash, *Field Office Federalism*, 79 VA. L. REV. 1957, 1990-2006 (1993).

111. See Calabresi & Prakash, *supra* note 3, at 641 (citing PHELPS, *supra* note 58, at 131-32).

112. Proclamation by George Washington, September 15, 1792, 32 WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 150-51 (emphasis added).

113. See McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 240.

lized, the state militias ceased to be under the jurisdiction of the governors. Organized as state units they were nonetheless the President's men exclusively."¹¹⁴ Washington also dramatically intervened in the law enforcement process by making stunning and wise use of the Pardon Power to pardon many of those involved in the Whiskey Rebellion.¹¹⁵ This set a precedent for an important practice that has subsequently grown of post wartime presidential pardons following such conflicts as the Civil War, the two World Wars, Vietnam, and the Cold War. Washington's pardon in this instance was a direct and highly personal intervention in the law enforcement process that was designed to heal and restore social peace. It too suggests a direct personal role in law enforcement issues for the First President.

Washington's willingness to seek help subject to presidential guidance and direction from *state* as well as *federal* officials was illustrated again when Citizen Genet approached various American citizens in an attempt to organize support for France's war with Britain in direct violation of the Neutrality Proclamation. This time Pennsylvania Governor Thomas Mifflin, an old political rival of Washington's, followed Washington's request and assisted the federal government in enforcing the Neutrality Proclamation without questioning Washington's authority to guide a state governor's execution of federal law.¹¹⁶ Washington issued similar requests for help subject to his guidance from other governors as well.¹¹⁷

Phelps concludes that together these events underscore the President's control over all officers—both state and federal—who enforce federal laws: "Where enforcement of the laws of the federal government was concerned, Washington firmly believed that governors were constitutionally subordinate to the president."¹¹⁸ Washington viewed his duty to "see that the laws be faithfully executed" as a personal responsibility that could not be delegated.

114. PHELPS, *supra* note 58, at 133.

115. See George Washington, *Proclamation of 10 July 1795*, reprinted in 4 KURLAND & LERNER, *supra* note 55, at 20.

116. See Calabresi & Prakash, *supra* note 3, at 640-41 (citing PHELPS, *supra* note 58, at 129).

117. See *id.* at 641 n.442 (citing McDONALD, *PRESIDENCY OF WASHINGTON*, *supra* note 96, at 127). Thus, contrary to Lessig and Sunstein's assertions, enforcement of federal laws by state officials during the early years of the Republic was not inconsistent with the unitary executive. See Lessig & Sunstein, *supra* note 6, at 18-20; see also Krent, *Executive Control*, *supra* note 105, at 303-09.

118. PHELPS, *supra* note 58, at 132.

As Phelps so aptly observes, “[R]esponsibility under the Constitution for actions of the chief executive was not collective; it was his alone. This also meant that the obligations of citizens and state officials under the laws of the Constitution were also due to him alone.”¹¹⁹

The Neutrality Proclamation also gave rise to the first full public defense of the theoretical and constitutional underpinnings of presidential power. Alexander Hamilton’s *Pacificus* letters, published to rally public support for the Neutrality Proclamation, publicly set out a sophisticated textual argument for presidential power in the foreign policy context and over removals. Hamilton’s principal thesis was that “[t]he general doctrine of our Constitution . . . is, that the *executive power* of the nation is vested in the President; subject only to the *exceptions* and *qualifications* which are expressed in the instrument.”¹²⁰ Hamilton observed that “[t]he second article of the Constitution of the United States, section first, establishes this general proposition, that ‘the EXECUTIVE POWER shall be vested in a President of the United States of America.’ [Article II, section 2] proceeds to delineate particular cases of executive power.”¹²¹ Hamilton reasoned:

It would not consist with the rules of sound construction, to consider this enumeration of particular authorities as derogating from the more comprehensive grant in the general clause, further than as it may be coupled with express restrictions or limitations; as in regard to the co-operation of the Senate in the appointment of officers and the making of treaties; which are plainly qualifications of the general executive powers of appointing officers and making treaties.¹²²

Accordingly, subject only to “these exceptions, the *executive power* of the United States is completely lodged in the President.”¹²³

Hamilton bolstered this conclusion by comparing the Vesting Clauses of Articles I and II:

119. *Id.* at 133.

120. Alexander Hamilton, *Pacificus* No. 1 (June 29, 1793), in 4 THE WORKS OF ALEXANDER HAMILTON 432, 439 (Henry C. Lodge ed., 1971) (emphasis in original).

121. *Id.* at 437-38.

122. *Id.* at 438. Hamilton also noted that the Constitution established an additional express restriction on executive power when it provided for “the right of the Legislature ‘to declare war, and grant letters of marque and reprisal.’” *Id.* at 439.

123. *Id.*

The different mode of expression employed in the Constitution, in regard to the two powers, the legislative and the executive, serves to confirm this inference. In the article which gives the legislative powers of the government, the expressions are: "All legislative powers herein granted shall be vested in a Congress of the United States." In that which grants the executive power, the expressions are: "*The executive power* shall be vested in a President of the United States."¹²⁴

Given the Article I Vesting Clause's specific limitation of congressional powers to those "herein granted" and given the absence of a similar limitation in the Executive Power Clause, Hamilton concluded that "[t]he enumeration [of Article II] ought therefore to be considered as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power." This construction of the Executive Power Clause was made all the more authoritative since "[t]his mode of construing the Constitution has indeed been recognized by Congress in formal acts upon full consideration and debate; of which *the power of removal from office is an important instance*."¹²⁵

That Hamilton would write such a powerful defense of the constitutional construction that underlies the theory of the unitary executive and of presidential removal power is especially telling. Although Hamilton had embraced the vision of a powerful, unitary executive in several of *The Federalist Papers*,¹²⁶ in *The Federal-*

124. *Id.* at 438.

125. *Id.* at 439 (emphasis added). See generally EDWARD S. CORWIN, *THE PRESIDENT* 209, 472 n.31 (5th ed., Randall W. Bland et al. eds., 1984) [hereinafter CORWIN, *THE PRESIDENT* (1984 ed.)]; LOUIS FISHER, *CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT* 16-17, 58 (3d ed. rev., 1991) [hereinafter FISHER, *CONSTITUTIONAL CONFLICTS*]; LOUIS FISHER, *PRESIDENT AND CONGRESS* 32-33 (1972) [hereinafter FISHER, *PRESIDENT AND CONGRESS*]; 1 WILLIAM M. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER* 178-82, 397-404 (1974); RICHARD LOSS, *THE MODERN THEORY OF PRESIDENTIAL POWER* 17-18 (1990).

126. In *The Federalist No. 70*, Alexander Hamilton argued that unity was the first ingredient of "Energy in the Executive," which Hamilton termed "a leading character in the definition of good government" and "one of the best distinguishing features of our constitution." Plurality in the executive, on the other hand, "tend[ed] to conceal faults and destroy responsibility." *THE FEDERALIST NO. 70*, at 471, 476 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Calabresi, *Some Normative Arguments*, *supra* note 11, at 37-47; Calabresi & Prakash, *supra* note 3, at 614. Furthermore, in *The Federalist No. 72*, Hamilton further indicated that all executive officers "ought to be subject to [presidential]

ist No. 77, he had also clearly suggested that "[i]t has been mentioned as one of the advantages to be expected from the cooperation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as appoint."¹²⁷ It appears that by the time Hamilton wrote his *Pacificus* letters, he had completely disavowed the views expressed in *The Federalist No. 77* and had fully embraced both presidential removal power and implicitly a power to control all exercises of law execution as well.¹²⁸

Madison responded to Hamilton in letters written under the pseudonym *Helvidius*,¹²⁹ and he decried Hamilton's construction of the foreign policy powers conferred by the Executive Power Clause as being "no less vicious in theory than it would be dangerous in practice." In Madison's eyes, the only possible source of Hamilton's broad definition of executive power in the foreign policy context was the "royal prerogatives in the British government, [which] are accordingly treated as executive prerogatives by British Commentators."¹³⁰ To draw on such an antidemocratic source to

superintendence." THE FEDERALIST NO. 72, at 487 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also Calabresi & Prakash, *supra* note 3, at 643 n.454.

127. THE FEDERALIST NO. 77, at 496-97 (Alexander Hamilton) (Edward M. Earle ed., 1976); see also Calabresi & Prakash, *supra* note 3, at 597 n.215, 643 n.454; EDWARD S. CORWIN, THE PRESIDENT'S REMOVAL POWER UNDER THE CONSTITUTION (1927), reprinted in 1 CORWIN ON THE CONSTITUTION 317, 339-40 (Richard Loss ed., 1981) [hereinafter CORWIN, PRESIDENT'S REMOVAL POWER]; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 125, at 53; 1 GOLDSMITH, *supra* note 125, at 181.

128. This conclusion is further supported by the fact that Hamilton himself regarded the *Pacificus* letters as the better reasoned statement of his views on the Constitution. See Richard Loss, *Corwin on Alexander Hamilton and the President's Removal Power*, in 1 CORWIN ON THE CONSTITUTION, *supra* note 131, at 373, 374-77 [hereinafter Loss, *Corwin on Hamilton*]; Douglass Adair, *The Authorship of the Disputed Federalist Papers*, 3 WM. & MARY Q. 97, 235 (1944), in FAME AND THE FOUNDING FATHERS 27, 73 (Trevor Colbourn ed., 1974).

129. Apparently, the *Helvidius* letters were prompted by Thomas Jefferson who, while generally happy with the Neutrality Proclamation, was disturbed by the implications of Hamilton's rhetoric. Jefferson entreated upon Madison, "Nobody answers him, his doctrines will therefore be taken for confessed. For God's sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public." Letter from Thomas Jefferson to James Madison (July 7, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON 338, 338 (Paul Leicester Ford ed., 1895). Madison acceded with considerable reluctance: "As I intimated in my last, I have forced myself into the task of a reply. I can truly say I find it the most grating one I ever experienced." Letter from James Madison to Thomas Jefferson (July 30, 1793), in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON 588, 588 (J.B. Lippincott ed., 1865).

130. James Madison, *Helvidius*, in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 152 (emphasis deleted).

define the scope of executive power over foreign policy in a democratic society was to him unthinkable.¹³¹ In making this argument, Madison was hampered by his own statements offered during the Decision of 1789, in which he had argued, as did the *Pacificus* letters, that the Executive Power Clause granted all executive power to the President and that any derogation from that grant should be strictly construed.¹³² Moreover, Madison was throughout his career a staunch defender of constitutionally vested presidential removal power.¹³³ In any event, Madison's protestations had little impact, as most historians have generally agreed that Hamilton's views on the scope of executive power have prevailed.¹³⁴

When viewed in their totality, Washington's statements and administrative practice strongly support the view that the President is responsible for execution of all federal law and thus may superintend all those authorized to execute it, removing those who do not do so to his satisfaction.¹³⁵ That Washington emerged as such

131. See generally CORWIN, *THE PRESIDENT* (1984 ed.), *supra* note 125, at 210, 472 n.33; FISHER, *CONSTITUTIONAL CONFLICTS*, *supra* note 125, at 17; FISHER, *PRESIDENT AND CONGRESS*, *supra* note 125, at 33; 1 GOLDSMITH, *supra* note 125, at 404; RALPH KETCHAM, *JAMES MADISON* 345-46 (1971); Loss, *Corwin on Hamilton*, *supra* note 128, at 20-21. For a modern discussion, see Calabresi, *Some Normative Arguments*, *supra* note 11, at 30-31; Calabresi, *Power Grants*, *supra* note 3, at 1392-93; Calabresi & Prakash, *supra* note 3, at 583-84.

132. 1 *ANNALS OF CONG.* 479-82, 499, 518 (Joseph Gales ed., 1789); see also Loss, *Corwin on Hamilton*, *supra* note 128, at 21. Madison's attempt to distinguish these positions was less than successful, being, in the words of Edward Corwin, "more adroit than convincing." CORWIN, *THE PRESIDENT* (1984 ed.), *supra* note 125, at 210.

133. The only exception is one brief statement made by Madison on one day about the Treasury Department bill which was later withdrawn. Otherwise, Madison staunchly defended this view from 1789 until the waning days of his life.

134. Richard Loss has noted that such eminent scholars as Henry Cabot Lodge and Hans Morgenthau have agreed that Hamilton's arguments have prevailed. See LOSS, *supra* note 125, at 23 & nn.147-51 (citing Lodge's statement in 4 *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 120, at 489 n.1; LOUIS HACKER, *ALEXANDER HAMILTON IN THE AMERICAN TRADITION* 198 (1957); HANS J. MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST* 14 (1951); HENRY J. FORD, *ALEXANDER HAMILTON* 288 (1920); FREDERICK OLIVER, *ALEXANDER HAMILTON* 335 (1927); and KETCHAM, *supra* note 131, at 346-47)); see also 1 GOLDSMITH, *supra* note 125, at 404. For a pro-Madison evaluation, see 3 IRVING BRANT, *JAMES MADISON: FATHER OF THE CONSTITUTION* 379 (1950).

135. See Calabresi & Prakash, *supra* note 3, at 662. There was one development during the Washington Administration that arguably suggested that Washington did not invariably adhere to the unitary theory of the executive. Although Congress firmly rebuffed James Madison's proposal that the Comptroller of the Treasury be given a fixed tenure of office, Congress did approve statutes requiring that the Comptroller countersign warrants drawn by the Secretary, see Act of Sept. 2, 1789, ch. 12, sec. 3, 1 Stat. 66, 66, and providing that the Comptroller's decisions would be "final and conclusive," Act of March 3, 1795, ch. 48, sec. 4, 1 Stat. 441, 442. Certain scholars have reasoned that these provisions

a strong advocate of executive unitariness is quite telling. It is often observed that the American presidency was created in George Washington's image since all of the Founders knew that he was almost certain to be the first occupant of the new chief executive office.¹³⁶ Nor were the potential constitutional implications of the precedents set lost on Washington. He explicitly cautioned his advisers that "[m]any things which appear of little importance in themselves and at the beginning, may have great and durable consequences from their having been established at the commencement of a new general government."¹³⁷ Washington similarly wrote to Madison, "As the first of every thing, *in our situation* will serve to establish a Precedent, it is devoutly wished on my part, that these precedents may be fixed on true principles."¹³⁸ Thus Washington was well aware of his unique position in this regard and his adoption of a unitary executive structure was the result of his best constitutional judgment.

B. John Adams

President John Adams was strongly committed to the theory of the unitary executive, and, as President, he continued Washington's practice of asserting complete control over the execution of federal law. Leonard White describes Adams as being "an uncompromising friend of the executive, on theoretical as well as practical

deprived the President of the authority to direct the Comptroller's execution of the law and thus are inconsistent with the unitary theory of the executive branch. See Tiefer, *supra* note 21, at 73-74; Bloch, *supra* note 16, at 578 n.55; Lessig & Sunstein, *supra* note 6, at 27; Rosenberg, *Congress's Prerogative*, *supra* note 6, at 654-55 & n.155.

Professor Calabresi and Sai Prakash have already addressed the flaws in this argument. See Calabresi & Prakash, *supra* note 3, at 653-54 & n.521. And in any event, the mere fact that Washington may have failed to object to two isolated deviations from the unitary executive theory does not constitute the degree of acquiescence needed to resolve the issue under the methodology of coordinate construction advanced by this Article.

136. This may generally be a phenomenon of presidential regimes. The presidency of the French Fifth Republic was, of course, created for Charles DeGaulle, the first occupant of that office. Similarly, the presidency of the Russian Federation was created by and for Boris Yeltsin, the current and only occupant of that office.

137. Queries on a line of conduct to be pursued by the President (May 10, 1789), in 30 THE WRITINGS OF GEORGE WASHINGTON, *supra* note 59, at 319, 321, quoted in PHELPS, *supra* note 58, at 122.

138. Casper, *Early Practices*, *supra* note 8, at 225 (quoting Letter from George Washington to James Madison (May 5, 1789), in 12 THE PAPERS OF JAMES MADISON 131, 132 (Charles F. Hobson & Robert A. Rutland eds., 1979)); see also PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW: CASES AND MATERIALS 14-15 (1996).

grounds.”¹³⁹ Thus, White notes that Adams wrote to Jefferson in the summer of 1789:

[I would] have given more power to the President, and less to the senate. The nomination and appointment to all offices, I would have given to the President, assisted only by a privy council of his own creation; but not a vote or voice would I have given to the senate or any senator unless he were of the privy council.¹⁴⁰

Adams expanded on these views in a lengthy letter to Roger Sherman in which he adamantly expressed the view that for seven reasons it had been a mistake even to give the Senate a role in advising on and consenting to presidential appointments.¹⁴¹ Adams gravely predicted that a role for the Senate in confirmations would “destroy the present form of government” and could even raise the “danger of dividing the continent into two or three nations, a case that presents no prospect but of perpetual war.”¹⁴² There is little question, then, that by 1789 Adams was a stalwart defender of greatly enhanced executive power who believed the Constitution gave the President too little power, not too much.

During his tenure as George Washington’s Vice President, and as the very first Vice President of the United States, John Adams had an early opportunity to play a critical role in the unitary executive debate. The key moment came when Adams cast a vital tie-breaking vote in the Senate thus participating directly in affecting the outcome of the famous Decision of 1789.¹⁴³ As James Hart recounts:

“[A] number” of senators who had favored presidential removal of the *other* Secretaries were at first against his removal of the Secretary of the *Treasury*. When the House adhered to its position, however, the vote of the Senate to recede was a tie of 10 to 10, which the Vice President broke in favor of presidential power.¹⁴⁴

139. WHITE, *THE FEDERALISTS*, *supra* note 60, at 92.

140. *Id.* at 93 (quoting Letter from John Adams to Thomas Jefferson (July 18, 1789), in 6 *THE WORKS OF JOHN ADAMS, SECOND PRESIDENT OF THE UNITED STATES* 430-31 (Charles Francis Adams ed., 1969)).

141. See Letter from John Adams to Roger Sherman (July 20, 1789), in 6 *THE WORKS OF JOHN ADAMS* 432-36, reprinted in 4 KURLAND & LERNER, *supra* note 140, at 106-08.

142. *Id.* at 107.

143. See HART, *supra* note 53, at 217 & n.279.

144. HART, *supra* note 53, at 217-18; see also McDONALD, *AMERICAN PRESIDENCY*,

John Adams's tie-breaking vote helped resolve a critical disagreement between the Senate and the House, and it made clear the recognition of the First Congress that the Constitution places the Treasury Department, like the Departments of Foreign Affairs and of War, under direct presidential control with a full presidential power of removal.¹⁴⁵

As President, Adams continued to adhere to and act upon these views. In a letter to Secretary of State Timothy Pickering, written during the first year of his administration, Adams criticized the plural executive directory then in place in France, which he thought could easily lead to a civil war. Adams observed:

The worst evil that can happen in any government is a divided executive; and, as a plural executive must, from the nature of men, be forever divided, this is a demonstration that a plural executive is a great evil, and incompatible with liberty. That emulation in the human heart, which produces rivalries of men, cities, and nations, which produces almost all the good in human life, produces, also, almost all the evil. This is my philosophy of government.¹⁴⁶

Thus, it comes as little surprise that, as Leonard White reports, "John Adams held the same general view of the position of department heads as Washington"¹⁴⁷ and, as President, continued Washington's practice of asserting complete control over the execution of federal law. When Adams and the Cabinet disagreed over major issues of federal policy, it was Adams who generally prevailed.¹⁴⁸ Adams also sharply criticized a provision of the Stamp Tax that arguably could have been construed to render the Treasury Secretary somewhat independent of presidential control. Although the

supra note 20, at 221 (citing *The Diary of William Maclay and Other Notes on Senate Debates in 9 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA* (Kenneth R. Bowling & Helen E. Veit eds. 1988)).

145. This was later confirmed again in the Salary Act, which established salaries for the executive officers of the government *including* the Secretary of the Treasury. *See* Act of Sept. 11, 1789, ch. 13, sec. 1, 1 Stat. 67.

146. WHITE, *THE FEDERALISTS*, *supra* note 60, at 29 (quoting Letter from John Adams to Timothy Pickering (Oct. 31, 1797), in 8 *THE WORKS OF JOHN ADAMS*, *supra* note 140, at 559, 560).

147. WHITE, *THE FEDERALISTS*, *supra* note 60, at 29.

148. *See* Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 486 n.11.

federal government's acute need for revenue in the end led Adams to approve the bill, Adams complained:

[T]he office of the secretary of the treasury is, in that bill, premeditatedly set up as a rival to that of the President; and that policy will be pursued, if we are not on our guard, till we have a quintuple or a centuple executive directory, with all the Babylonish dialect which modern pedants most affect.¹⁴⁹

Adams also followed Washington's precedent of using military force for law enforcement purposes to subdue the so-called Fries Rebellion in eastern Pennsylvania. After Fries was sentenced to death, Adams intervened again in the law enforcement process, using his pardon power to pardon both Fries and his accomplices.¹⁵⁰ Clearly, in practice as well as in theory, John Adams deserves to be counted as being squarely within the pro-unitary executive camp.

Furthermore, although Adams used the removal power sparingly, he did not hesitate to use it to maintain his control of the executive branch. Leonard White observes that Adams removed twenty-one civil officers (counting two who were not reappointed) and six army officers: among these were the Secretary of State, Timothy Pickering, one minister and four consular officers, one marshall, seven collectors, five surveyors, one supervisor, and one commissioner of court.¹⁵¹ Although removals were rare and were usually for poor performance in office, Adams did depart from Washington's practice by making "a few changes [in personnel] in which party differences played a part."¹⁵² White persuasively describes Adams's removals of Joseph Whipple, collector at Portsmouth, and William Gardner, commissioner of loans for New Hampshire, as being in this category, along with his removal of Tench Coxe, who

149. WHITE, *THE FEDERALISTS*, *supra* note 60, at 30 (quoting Letter from John Adams to Oliver Wolcott, Jr. (Oct. 20, 1797), in 8 *THE WORKS OF JOHN ADAMS*, *supra* note 140, at 554, 555).

150. WHITE, *THE FEDERALISTS*, *supra* note 60, at 422-23.

151. *See id.* at 285; *see also* VAN RIPER, *supra* note 77, at 21. Adams also removed James McHenry as Secretary of War. David F. Forte, *Marbury's Travail: Federalist Politics and William Marbury's Appointment as Justice of the Peace*, 45 CATH. U. L. REV. 349, 393 (1996); Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 485.

152. WHITE, *THE FEDERALISTS*, *supra* note 60, at 287.

was discharged as Commissioner of Revenue for shifting his political allegiance from Hamilton to Jefferson.¹⁵³

Perhaps the best example of Adams's domination of his administration is his struggle with Secretary of State Pickering. A member of Alexander Hamilton's rival faction of the Federalist party, Pickering disagreed with Adams over one of the most important matters of public policy facing the new republic: the nation's relations with France. Pickering also provoked Adams's personal ire by supporting Hamilton's bid to become second-in-command of the army (after George Washington) and by galvanizing the opposition to the nomination of Adams's son-in-law as adjutant general.¹⁵⁴ After Pickering refused Adams's invitation to resign, Adams summarily removed him, flatly stating that "[d]ivers [sic] causes and considerations, essential to the administration of the government, [sic] in my judgment, requir[e] a change in the department of State."¹⁵⁵ In sum, Adams used his removal powers more often than Washington did, and he was the first President to remove an official for political reasons. In so doing, as one historian has noted, Adams "completed the demonstration of his supremacy in Executive affairs."¹⁵⁶

By the end of the Adams Administration the first twelve critically important years of unbroken presidential practice had firmly established a strongly unitary vision of presidential power over law execution. As Leonard White concludes:

When the Federalists turned over the government to Jefferson in 1801 they left behind them a clear and consistent pattern of executive relationships. They fully accepted the statement of the Constitution that the executive power was vested in the President. Their representatives in the legislative branch wrote this theory into the statutes conferring administrative authority. Their members in the Executive branch put into practice what the Constitution and law

153. *See id.* at 287-89.

154. *See id.* at 243-52.

155. *See id.* at 252; *see also* ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 466 (1941); 2 GEORGE H. HAYNES, *THE SENATE OF THE UNITED STATES* 802 n.3 (1938). Pickering later acknowledged that he expected that his opposition to the nomination of Adams's son-in-law would lead to his own removal. *See* WHITE, *THE FEDERALISTS*, *supra* note 60, at 251.

156. MARY BURKE HINSDALE, *A HISTORY OF THE PRESIDENT'S CABINET* 35 (1911), *quoted in* Cross, *Executive Orders* 12,291 and 12,498, *supra* note 3, at 485-86.

enjoined. Washington made the decisions of executive policy, but on the basis of regular conference with department heads. The rise of the Cabinet as an organ of consultation and advice did not obscure the single responsibility of the President or the subordinate position of Cabinet members. Even after the Federalists had split into factions during Adams' administration, the leading figures on both sides agreed in maintaining the unity of executive power and the dominating position of the President. The power to govern was quietly but certainly taken over by the President. The heads of departments became his assistants. In the executive branch, according to Federalist orthodoxy, the President was undisputed master.¹⁵⁷

C. Thomas Jefferson

Thomas Jefferson's first reaction to the office of the presidency as described in the text of the proposed Constitution of 1787 was the exact opposite of Theodore Lowi's. Where Lowi believes that we originally had a weak parliamentary executive, Jefferson wrote:

[The newly proposed] President seems a bad edition of a Polish King. He may be reelected from 4. years to 4. years for life. . . . When one or two generations shall have proved that this is an office for life, it becomes on every succession worthy of intrigue, of bribery, of force, and even of foreign interference.¹⁵⁸

Thus, in 1787, Jefferson shared much of the widespread view of the Anti-Federalists that the Framers had given the president a dangerous amount of power. He adhered to this view in the 1790s when he consistently rejected Hamiltonian and Federalist views of Executive Power that "smelled of monarchy."¹⁵⁹

Jefferson hated executive tyranny, but he was *not* opposed to the very different idea that a unitary and independent executive structure should be created. Leonard White notes that while the more extreme Republicans favored making heads of departments independent of the President, Jefferson, Madison, Albert Gallatin, and other, more thoughtful members of the Republican party fully

157. WHITE, *THE FEDERALISTS*, *supra* note 60, at 36-37.

158. Letter from Thomas Jefferson to John Adams (Nov. 13, 1787), in 12 *THE PAPERS OF THOMAS JEFFERSON* 349, 351 (Julian P. Boyd ed., 1955).

159. WHITE, *THE FEDERALISTS*, *supra* note 60, at 94, 95-96.

recognized the need for a strong, unitary executive.¹⁶⁰ Jefferson thus supported the idea of a strong executive branch directly responsible to the President and independent of legislative control. He opposed what he perceived as an attempt by Alexander Hamilton to insinuate himself into the legislative activities of the House of Representatives. It was this legislative role of Hamilton's that triggered Jefferson's ire and cause him to complain in the 1790s that the executive was exceeding its constitutional limits and intruding upon the prerogatives of the legislature. As Jefferson wrote:

Here then was the real ground of the opposition which was made to the course of administration. Its object was to preserve the legislature pure and independent [sic] of the Executive, [and] to restrain the administration to republican forms and principles.¹⁶¹

Thus, Jefferson's concerns about executive power did not involve the issue of executive unitariness and autonomy. As he told Washington, "[I]f the equilibrium of the three great bodies Legislative, Executive, and judiciary could be preserved, if the Legislature could be kept independent [sic], I should never fear the result of such a government."¹⁶² Given the history in England of monarchs bribing members of parliament to get legislation passed,¹⁶³ and given the special need for George Washington as the Nation's first President to be a unifying figure, Jefferson's concern about the impropriety and impoliticness of Hamilton's hyper-aggressive legislative program was understandable. Jefferson's concern is all the more understandable when we remember that he disagreed vehemently with many of Hamilton's policy views.

Jefferson's support for a strong, independent, unitary executive was evident when he served as Secretary of State during the Washington Administration. In a written opinion to President Washing-

160. *See id.* at 95.

161. *The Anas* (February 4, 1818), in THOMAS JEFFERSON: WRITINGS 661, 670 (Merrill D. Peterson ed., 1984), *quoted in* WHITE, THE FEDERALISTS, *supra* note 60, at 95.

162. WHITE, THE FEDERALISTS, *supra* note 60, at 95-96 (quoting 1 THE WORKS OF THOMAS JEFFERSON 236 (Paul Leicester Ford ed., 1904)).

163. Calabresi & Larsen, *supra* note 57, at 1053. The Incompatibility Clause was added to the Constitution to prevent the President from inducing Members of Congress to vote for his legislative program by offering to appoint them to high executive and judicial offices. English monarchs had done precisely this, and their misconduct had left Americans with very bad memories of the corruption they associated with executive monarchs with a legislative program.

ton, Secretary of State Jefferson specifically endorsed the notion that the opening Executive Power Vesting Clause of Article II of the Constitution conferred a general "grant" of the executive power on the President of the United States.¹⁶⁴ Many years later, Jefferson's arch-foe, Alexander Hamilton, observed:

[I]t is not true . . . that [Jefferson] is an enemy to the power of the Executive, or that he is for confounding all the powers in the House of Representatives. It is a fact which I have frequently mentioned, that, while we were in the administration together, he was generally for a large construction of the Executive authority and not backward to act upon it in cases which coincided with his views.¹⁶⁵

Jefferson's conduct as Secretary of State further suggests his recognition of the need for presidential control of all executive matters. Even though he disagreed with Washington on a wide variety of policy matters, Jefferson unfailingly carried all of Washington's policies into effect "as sincerely as if they had been my own, tho' I ever considered them as inconsistent with the honor and interest of our country."¹⁶⁶ In a letter to William Short, Jefferson observed bluntly that "the nature of our government . . . renders it's [sic] heads [i.e., the President and Senate] too responsible to permit them to resign the direction of affairs to those under them. The public would not be satisfied with that kind of resignation, and be assured it does not exist."¹⁶⁷ Finally, when Jefferson concluded that he could no longer serve Washington in good conscience, he resigned. He never considered holding onto office and acting contrary to Washington's wishes when doing so would fragment the unity of the executive branch.¹⁶⁸

164. Opinion on the question whether the Senate has the right to negative the grade of persons appointed by the Executive to fill Foreign Missions, in 7 *The Complete Jefferson* 138, 138-39 (Saul K. Padover ed., 1943) cited in HART, *supra* note 53, at 178 n.105.

165. Letter from Alexander Hamilton to James A. Bayard (January 16, 1801), in 10 *THE WORKS OF ALEXANDER HAMILTON*, *supra* note 120, at 412, 413, quoted in LEONARD D. WHITE, *THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1801-1829* 31 (1951) [hereinafter WHITE, *THE JEFFERSONIANS*].

166. Letter from Thomas Jefferson to George Washington (Sept. 9, 1792), in 24 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 158, at 351, 354 quoted in WHITE, *THE FEDERALISTS*, *supra* note 60, at 29.

167. Letter from Thomas Jefferson to William Short (Sept. 30, 1790), in 17 *THE PAPERS OF THOMAS JEFFERSON*, *supra* note 158, at 543-44, quoted in WHITE, *THE FEDERALISTS*, *supra* note 60, at 27.

168. WHITE, *THE FEDERALISTS*, *supra* note 60, at 29.

Jefferson assumed the presidency on March 4, 1801, and he soon surprised many supporters and opponents alike with his robust views about the powers of the office. In fact, however, Jefferson had never been as opposed to presidential power as many imagined, and he did not join the most extreme members of his party in their overly timorous view of the executive power. As President, Jefferson continued to support strong, independent, unitary executive authority. Unlike Washington and Adams, Jefferson insisted on complete harmony and unanimity in his Cabinet, since "the power of decision in the President left no object for internal dissension."¹⁶⁹ And, with respect to supervision of law execution decisions by subordinates, Jefferson endorsed and adopted Washington's practice of reviewing the correspondence of his cabinet officials as a means of maintaining unity of action and the President's responsibility for the affairs of the executive branch.¹⁷⁰ At times, Jefferson concerned himself with even the most minute and inconsequential matters being addressed by his subordinates. Leonard White notes:

Thus we find Jefferson instructing Gideon Granger on the problem of post-road river crossings in the western wilderness. "I would propose that all streams under 40.f width not fordable *at their common winter tide* shall be bridged; & over all streams not bridged, a tree should be laid across, if their breadth does not exceed the extent of a single tree." On another occasion he approved an increase of pay of \$150 to an Indian agent. Early in his administration Gallatin authorized an expenditure of \$600 to repair a leaky hospital roof in Norfolk as an emergency matter that would normally have gone to the President.¹⁷¹

Jefferson also took control of federal prosecutions, directing the district attorneys to cease all prosecutions under the Alien and Sedition Acts¹⁷² and pardoning those already convicted under

169. Letter from Thomas Jefferson to A.L.C. Destutt de Tracy (January 26, 1811), in THOMAS JEFFERSON: WRITINGS, *supra* note 161, at 1241, 1245, *quoted in* McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 258.

170. Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3 at 486; DeMuth & Ginsburg, *supra* note 74, at 1075 (citing THOMAS JEFFERSON, THE COMPLETE JEFFERSON, *supra* note 164, at 306-07).

171. WHITE, THE JEFFERSONIANS, *supra* note 165, at 71 (citations omitted).

172. See Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 129, at 253; Letter from Edwin Liv-

them.¹⁷³ He also took an active role in the prosecution for treason of his first Vice President, Aaron Burr.¹⁷⁴ It is no wonder in light of Jefferson's concern with matters of this kind that White concludes that Jefferson was maintaining a tight and centralized control over "the whole business of the executive branch, domestic and foreign."¹⁷⁵

Perhaps even more indicative of Jefferson's determination to assert his control over the executive branch were his vigorous and partisan removal policies. After twelve years of Federalist rule, capped by Adams's "midnight appointments," President Jefferson was faced with an executive branch filled entirely with Federalist appointees. Although initially inclined not to remove any officers for differences of political opinion, Jefferson quickly realized that the removal power was the only way to consolidate his control over the Administration.¹⁷⁶ However, Jefferson's previous opposition to politically motivated removals during the Washington and Adams Administrations left him with little political room to maneuver. Particularly after stating in his inaugural address that "We are all Republicans, we are all Federalists,"¹⁷⁷ Jefferson faced substantial difficulties in defending purely partisan removals.

Jefferson responded with characteristic shrewdness by arguing that his removals were in fact consistent with nonpartisanship, since true nonpartisanship required that each party had a right to fair representation in the government. The only way to implement his "[d]eclarations . . . in favor of *political tolerance*, exhortations to *harmony* and affection in social intercourse, and to respect the *equal rights* of the minority" was to permit the Republicans "to

ington (Nov. 1, 1801), in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 129, at 57-58; Letter from Thomas Jefferson to Gideon Granger (Mar. 9, 1814), in 9 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 129, at 454; *see also* Easterbrook, *supra* note 28, at 907.

173. *See* McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 268.

174. *See* JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 353-74 (1996).

175. WHITE, THE JEFFERSONIANS, *supra* note 165, at 70.

176. *See* McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 254. As Jefferson noted privately, "If a due participation of office is a matter of right, how are vacancies to be obtained? Those by death are few; by resignation, none. Can any other mode than that of removal be proposed?" Message from Thomas Jefferson to Elias Shipman and Others, a Committee of the Merchants of New Haven (July 12, 1801), in THOMAS JEFFERSON: WRITINGS, *supra* note 161, at 497, 499 [hereinafter Message from Jefferson to Shipman]; *see also* 1 GOLDSMITH, *supra* note 125, at 165; VAN RIPER, *supra* note 77, at 22.

177. Thomas Jefferson, First Inaugural Address (March 4, 1801), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 309, 310 (James D. Richardson ed., 1897) [hereinafter MESSAGES & PAPERS].

assert some rights . . . also." Since "the will of the nation, manifested by their elections," had called for a new administration, it would be "political intolerance" to deny the Republicans the right "to claim a proportionate share in the direction of public affairs."¹⁷⁸ However, Jefferson cannily claimed that these removals gave him no joy and pledged that he would revert back to making merit removals:

This is a painful office; but it is made my duty, and I meet it as such. . . . It would have been to me a circumstance of great relief, had I found a moderate participation of office in the hands of the majority. I would gladly have left to time and accident to raise them to their just share. But their total exclusion calls for prompt corrections. I shall correct the procedure; but that done, return with joy to that state of things when the only questions concerning a candidate shall be, is he honest? Is he capable? Is he faithful to the Constitution?¹⁷⁹

The general public accepted Jefferson's justification for his partisan removals. After exercising the power gingerly during the first year, Jefferson expanded his program, initiating changes in between one third and one half of all presidentially appointed offices.¹⁸⁰ Thus, in his removals as well as his control over the entire executive branch, Jefferson adhered to the expansive view of presidential power established by Washington and Adams.

Another striking development during Jefferson's presidency was his formulation of and strident advocacy for the position that the President has a co-equal power with the Courts to engage in constitutional review. Jefferson clearly believed in the legitimacy of co-ordinate or departmental judicial review, and he expressed that view as eloquently and forcefully as anyone who has ever occupied

178. Message from Jefferson to Shipman, *supra* note 176, at 498; *see also* 1 GOLDSMITH, *supra* note 125, at 165; McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 254-55; VAN RIPER, *supra* note 77, at 22.

179. Message from Jefferson to Shipman, *supra* note 176, at 499-500; *see also* 1 GOLDSMITH, *supra* note 125, at 165; McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 254-55. Jefferson even went so far as to contend that the large number of unremovable Federalist judges justified removing the vast majority of the marshals and district attorneys. NORMAN J. SMALL, SOME PRESIDENTIAL INTERPRETATIONS OF THE PRESIDENCY 127 (1932).

180. *See* 1 GOLDSMITH, *supra* note 125, at 165; McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 255; VAN RIPER, *supra* note 77, at 22.

the presidential office. In his celebrated letter to Abigail Adams in response to her letter complaining of his disregard of the Alien and Sedition Acts, he wrote:

You seem to think it devolved on the judges to decide on the validity of the sedition law. But nothing in the Constitution has given them a right to decide for the Executive, more than to the Executive to decide for them. Both magistrates are equally independent in the sphere of action assigned to them. The judges, believing the law constitutional, had a right to pass a sentence of fine and imprisonment; because that power was placed in their hands by the Constitution. *But the Executive, believing the law to be unconstitutional, was bound to remit the execution of it; because that power has been confided to him by the Constitution.* That instrument meant that its co-ordinate branches should be checks on each other. But the opinion which gives to the judges the right to decide what laws are constitutional, and what not, not only for themselves in their own sphere of action, but for the Legislature & Executive also, in their spheres, would make the judiciary a despotic branch.¹⁸¹

Jefferson reiterated this view many years later in a letter to a friend:

You seem . . . to consider the judges as the ultimate arbiters of all constitutional questions; a very dangerous doctrine indeed, and one which would place us under the despotism of an oligarchy. . . . The constitution has erected no such single tribunal, knowing that to whatever hands confided, with the corruption of time and party, its members would become despots. It has more wisely made all the departments co-equal and co-sovereign within themselves. . . . Betrayed by English example, and unaware, as it should seem, of the control of our constitution in this particular, they have at times overstepped their limit by undertaking to command executive officers in the discharge of their executive duties; but the constitution, in keeping

181. Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), in 11 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 129, at 310, 311 (emphasis added); see also McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 267-68.

three departments distinct and independent, restrains the authority of the judges to judiciary organs, as it does the executive and legislative to executive and legislative organs.¹⁸²

Jefferson believed that each of the three branches of government possessed the independent authority to interpret its own obligations under the Constitution and to exercise the authority vested by that document free from any interference by the other branches. Consistent with this view, Jefferson resisted an attempt by Chief Justice Marshall, while presiding over Aaron Burr's trial for treason, to require the President to appear in court and present certain documents. Jefferson refused to appear or present any documentary material in court at all, instead submitting a portion of the subpoenaed documents to the district attorney.¹⁸³ Moreover, Jefferson was not concerned by the portion of *Marbury v. Madison* holding the Judiciary Act of 1801 unconstitutional, as Jefferson recognized that each of the three branches had the authority and the obligation to construe the Constitution. Jefferson's primary objection was to the opinion's dicta suggesting that the executive branch was subject to orders from the judiciary. Courts in his view did not have *any* right to interfere with the President's authority over the entire executive branch and courts could not *even* issue writs of mandamus against executive officials. For Jefferson, unconstitutional executive actions were properly addressed *only* in the democratic

182. Letter from Thomas Jefferson to William Charles Jarvis (Sept. 28, 1820), in 10 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 129, at 160, 160-61. Jefferson had originally wanted to lay out his theory of coordinate constitutional construction in his First Annual Message to Congress, but as Forrest McDonald notes, Madison and Gallatin dissuaded him from doing so to avoid arousing the ire of the Federalists, who still controlled the bulk of the judiciary and would likely continue to support judicial supremacy on political grounds. MCDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 267 n.41.

183. See MCDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 270. Similarly, Attorney General Caesar Rodney indicated to President Jefferson that courts could not issue a writ of mandamus against an executive officer exercising discretionary functions and that the proper remedy against officials improperly exercising their discretion was an action at law or a criminal indictment. The contrary rule would vitiate "the controlling power in the chief magistrate of the United States," "would necessarily have the effect of transferring the powers vested in one department to another department," would permit the courts to exercise control over an executive function in violation of the Take Care Clause, and would destroy "that unity of administration which the constitution meant to secure by placing the executive power for them all, in the same head." Letter from C.A. Rodney to Thomas Jefferson (July 15, 1808), reprinted in *Gilchrist v. Collector of Charleston*, 10 F. Cas. 355, 358-59 (C.C.D.S.C. 1808) (No. 5420).

process by the people themselves and not in litigation before judges!

This was an extraordinary claim of executive power, so extraordinary in fact that thankfully it has not been followed. Jefferson's claim in his letter to Abigail Adams that the President is without power to execute a law that he deems to be unconstitutional in his own independent judgment, paired with Jefferson's own views, provide a striking vision of presidential power.

Indeed, in the later years of his administration, Jefferson began to move beyond the bounds of his initial vision of a President who was autonomous only within his own limited sphere of law execution powers. It was at this point that Jefferson really began to press up against the outermost constitutional limits of presidential power. In sharp contrast to Washington, who was extremely circumspect about making any specific legislative proposals, and in direct contradiction of his own previous criticism of Hamilton's efforts to influence Congress, Jefferson as President began to assume the role of national political leader and in this capacity he began to take control of Congress's legislative agenda to a greater extent than had either of his two predecessors. As Forrest McDonald has noted:

[T]he President alone, as Jefferson put it, could "command a view of the whole ground" as representative of the nation and not merely of a state or a congressional district; the concentration of authority in one disinterested servant of the whole gave him a decisiveness as well as a vision that the other branches lacked.¹⁸⁴

So much for Jefferson's earlier concerns about the threat to legislative independence posed by vigorous executive action.

Jefferson's expanding view of presidential power is also reflected in what is perhaps the most famous and consequential legacy of his Presidency: the Louisiana Purchase. As Gerhard Casper suggests, this action raised serious separation of powers concerns as well as federalism concerns.¹⁸⁵ Although Jefferson had initially

184. McDONALD, *AMERICAN PRESIDENCY*, *supra* note 20, at 259 (quoting Thomas Jefferson, First Inaugural Address, in 1 *MESSAGES & PAPERS*, *supra* note 177, at 324).

185. The Louisiana Purchase raised serious questions of federalism because the Constitution did not directly grant to the federal government the power to acquire additional territory. Under a strict construction of the Constitution, such an acquisition lay outside the scope of any constitutional grant and was properly subject to the power of the states. To the extent that the Purchase did lie within the proper scope of federal authority, it

opined that the Constitution would have to be amended before the federal government would have the authority to undertake the Louisiana Purchase,¹⁸⁶ in a remarkable letter written in 1803, Jefferson sought to justify the Louisiana Purchase in the absence of such an amendment by advancing an extraordinarily broad, almost Lincolnian, view of presidential power “to act as a ‘guardian’ or ‘steward’ for the people”¹⁸⁷ even when the Constitution strictly construed did not allow for this:

The Executive in seizing the fugitive occurrence, which so much advances the good of their country, have [sic] done an act beyond the Constitution. The Legislature in casting behind them metaphysical subtleties, and risking themselves like faithful servants, must ratify & pay for it, and throw themselves on their country for doing for them unauthorized what we know they would have done for themselves had they been in a situation to do it. It is the case of a guardian, investing the money of his ward in purchasing an important adjacent territory; & saying to him when of age, I did this for your good; I pretend to no right to bind you; you may disavow me, and I must get out of the scrape as I can: I thought it my duty to risk myself for you. But we shall not be disavowed by the nation, and their act of indemnity will confirm & not weaken the Constitution, by more strongly marking out its lines.¹⁸⁸

As Casper goes on to note, Jefferson was defiant upon leaving office that “[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”¹⁸⁹ This defense of the Louisiana Purchase suggests that Jefferson certainly cannot be ranked as

implicated the separation of powers as well, since it was unclear which branch of the federal government was properly invested with such authority. Gerhard Casper, *Thomas Jefferson*, *supra* note 16, at 490-96.

186. *See id.* at 495; McGinnis, *Opinion Function*, *supra* note 37, at 412-19.

187. SHANE & BRUFF, *supra* note 138, at 16.

188. Letter from Thomas Jefferson to John Breckenridge (Aug. 12, 1803), in THOMAS JEFFERSON: WRITINGS, *supra* note 161, at 1136, 1138-39, *quoted in* Casper, *Thomas Jefferson*, *supra* note 16, at 496, and in SHANE & BRUFF, *supra* note 138, at 16.

189. Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 9 THOMAS JEFFERSON: WRITINGS, *supra* note 161, at 1231, 1231, *quoted in* Casper, *Thomas Jefferson*, *supra* note 16, at 496.

a weak President or as one who was unwilling to use the full powers of the office when the occasion demanded it. This of course makes sense intuitively. Jefferson was a popular and charismatic political leader, the author of the Declaration of Independence, and one of the foremost statesmen of his day. It would be astonishing if such an individual were to act timidly in office, and Jefferson certainly did not do so. Rather, he used the full panoply of powers left to him by his Federalist predecessors and, as Professors Peter Shane and Harold Bruff have indicated, he "set a precedent for a strong Presidency, one which would be taken to heart by several later executives."¹⁹⁰

By the time Jefferson had completed his two terms in office, he was as enthusiastic and committed an advocate of the unitary executive as has ever walked the earth. On January 26, 1811, as Jefferson was preparing to hand over the reigns of power to his best friend and neighbor, James Madison, he wrote a striking letter to a French friend of his, A.L.C. Destutt de Tracy. Comparing the American Presidency with the plural executive created by the French Revolutionaries, Jefferson observed that:

One of [Montesquieu's] doctrines, indeed, the preference of a plural over a singular executive, will probably not be assented to here. When our present government was first established, we had many doubts on this question, and many leanings towards a supreme executive council. It happened that at that time the experiment of such an one was commenced in France, while the single executive was under trial here. We watched the motions and effects of these two rival plans, with an interest and anxiety proportioned to the importance of a choice between them. The experiment in France failed after a short course, and not from any circumstances peculiar to the times or nation, but from those internal jealousies and dissensions in the Directory, which will ever arise among men equal in power, without a principal to decide and control their differences. We had tried a similar experiment in 1784, by establishing a committee of the States. . . . They fell immediately into schisms and dissensions. . . . This was then imputed to the temper of two or three individuals; but the wise ascribed it to the nature of man.¹⁹¹

190. SHANE & BRUFF, *supra* note 138, at 16.

191. Letter from Thomas Jefferson to A.L.C. Destutt de Tracy (Jan. 26, 1811), in

There can be little doubt then that Jefferson's views of presidential power inclined strongly in an executive unitarian direction. By the end of his Administration, Jefferson was unquestionably a strong and effective advocate of presidential power.

D. James Madison

James Madison was, along with James Wilson, one of the key architects of the presidency at the Constitutional convention, and he was a vigorous advocate both of a strong presidency and of the view that the Constitution gave the president the removal power. As James Hart noted:

The student of our constitutional history cannot fail to be impressed by the fact that the theory that the opening sentence of Article II of the Constitution is a grant of "the" executive power was expressed by Madison, Jefferson and Hamilton. Of their historic pronouncements the first in time was that of Madison in the removal debate of 1789.¹⁹²

According to Madison:

[Where the Constitution] has left any particular department in the entire possession of the powers incident to that department, I conceive we ought not to qualify them further than they are qualified by the constitution. . . .

The constitution affirms, that the executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The constitution says, that in appointing to office, the Senate shall be associated with the President. . . . Have we a right to extend this exception? I believe not. If the constitution has invested all executive power in the President, I venture to assert that the Legislature has no right to diminish or modify his executive authority.

The question now resolves itself into this, *Is the power of displacing, an executive power? I conceive that if any power whatsoever is in its nature executive, it is the power*

THOMAS JEFFERSON: WRITINGS, *supra* note 161, at 1243.

192. HART, *supra* note 53, at 178 (footnotes omitted). Jefferson's opinion on this appears in a written opinion to President Washington issued while he was Secretary of State. See *supra* note 164.

*of appointing, overseeing, and controlling those who execute the laws.*¹⁹³

Thus, as a member of the first Congress, Madison placed himself squarely on the record as an advocate of both the constitutional grant theory of the Article II Vesting Clause and of the view that the executive power conferred by that Clause included a power of removal. As is well known, Madison briefly wavered in this view in his comments one day on the House floor during the debate over the Office of the Comptroller of the Treasury, but he swiftly returned to the executive unitarian fold after other Members of Congress objected to his Treasury proposal on unitarian grounds.

Between the Decision of 1789 and the Revolution of 1800, Madison's enthusiasm for Executive Power waned as he fell into Jefferson's opposition political camp. It was during this period that Madison wrote his *Helvidius* letters, discussed above, wherein he challenges Hamilton's argument for broad foreign policy making powers derivable from the Article II Executive Power Vesting Clause. Madison's argument in the *Helvidius* letters is in tension with, but is not necessarily inconsistent with, his argument for a presidential removal power derivable from the Vesting Clause. One could perfectly well believe that the "Executive Power" conferred by Article II included a removal power but not the unilateral presidential powers over foreign policy that Hamilton was arguing for. Other parts of the Constitution would support this construction—the Take Care Clause supports construing the Vesting Clause as granting removal power, while the Declaration of War and Treaty-Making Clauses support the Madisonian view of a more limited power in the foreign policy arena. Thus, Madison's statements in the *Helvidius* letters do not detract a bit from our argument that he falls squarely in the unitary executive camp. It is perfectly consistent with the theory of the unitary executive to reject broad, unenumerated presidential powers over foreign policy.

After the Revolution of 1800, Thomas Jefferson assumed the presidency for eight years and, as we have discussed, he became a strong advocate of presidential power. James Madison did not undergo a similar transformation during his eight years in office, although more for reasons of his personality than because of his constitutional beliefs. "James Madison . . . did not exert the degree of broad control over the executive branch as had his predeces-

193. 1 ANNALS OF CONG. 481-82 (emphasis added).

sors.”¹⁹⁴ Despite his dynamic role in framing the Constitution and in supporting the Decision of 1789, he proved to be a weak President and often found his policies frustrated by Congress. That being said, nothing in the conduct of the Madison Administration in any way suggested that Madison acquiesced to any dissipation in the unitariness of the executive branch. Quite the contrary, Madison continued to exert his direct influence over the departments, even going so far as to redraft ordinary correspondence issued by the State Department.¹⁹⁵

Madison did not hesitate to exert his control over the executive branch by using his power of removal. He called for the resignation of his Secretary of State, Robert Smith, and he also compelled the resignation of his Secretary of War, John Armstrong.¹⁹⁶ Congress did begin to resist presidential control of the department heads in 1814 after Madison removed Gideon Granger as Postmaster General. In response to this removal, the Senate debated a resolution calling upon the President “to inform the Senate whether his office of Postmaster General be now vacant, and, if vacant, in what manner the same became vacant.” In the end, however, the Senate rejected this resolution, concluding that it did not have the right to make such an inquiry.¹⁹⁷

Leonard White describes the general practice with respect to removals during Madison’s Administration as follows:

Madison removed twenty-seven presidential officers during his eight years in the White House. Almost without exception they were officers collecting the revenue. Madison was under some pressure after the War of 1812 to find civil employment for supernumerary military officers, but declined to disturb the civil service. He was prepared to favor meritorious and indigent officers, but only where a removal could be justified “by legitimate causes.” Crawford once remarked that Madison could not bear to turn men out of office for “simple incapacity.”¹⁹⁸

194. See Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 486-87 (citing HINSDALE, *supra* note 156, at 51).

195. See *id.* at 487 (citing HINSDALE, *supra* note 156, at 52).

196. See *id.* (citing HINSDALE, *supra* note 156, at 52-53, 56-57).

197. See 2 HAYNES, *supra* note 155, at 793 n.4 (citing LUCY M. SALMON, *HISTORY OF THE APPOINTING POWER OF THE PRESIDENT* 44 (1886)); Warren, *supra* note 21, at 5.

198. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 379.

Clearly, then, the removal power did not lapse during Madison's years, although it was not used very vigorously. Of course, after eight years of Jefferson in the White House, Madison would not have felt the need experienced by his two immediate predecessors to make more removals.

Finally, Madison concurred, although with caution, in Jefferson's ambitiously expressed views concerning the power of the President to engage in coordinate constitutional construction or departmental review. Writing many years after he left office, Madison observed:

As the Legislative, Executive, and Judicial departments of the United States are co-ordinate, and each equally bound to support the Constitution, *it follows that each must be guided by the text of the Constitution according to its own interpretation of it*; and, consequently, that in the event of irreconcilable interpretations, the prevalence of the one or the other department must depend on the nature of the case, as receiving its final decision from the one or the other, and passing from that decision into effect, without involving the functions of any other.¹⁹⁹

Madison, however, qualified the harshness of his endorsement of the Jeffersonian view of coordinate construction, with its sweeping implication of a presidential power to decline to enforce a law the President alone thought was unconstitutional. He said that ordinarily the judiciary would construe the Constitution, and he pointed out some reasons why so long as the judicial bench was "happily filled" the public would have the most confidence in its constructions of the Constitution.²⁰⁰

Thus, in the end, Madison was something of a moderate on the question of coordinate construction. In theory, he agreed that Jefferson was right, and he endorsed full fledged departmentalism as his bedrock constitutional analysis. But, in practice, he wisely doubted whether in ordinary times the constitutional system should operate that way. We suspect Madison would have approved of the practice that has actually grown up under the Constitution of reserving executive and legislative construction for those rare periods

199. Letter written in 1834 by James Madison, in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 349, 349 (emphasis added).

200. *Id.*

of crisis that have punctuated American constitutional history²⁰¹ and for laws that clearly encroach on core executive prerogatives. Thus, it might be fair to conclude that Madison was enough of a departmentalist that he would have embraced the core thesis of this Article were he alive to read it.

In sum, Madison supported executive power throughout his long and distinguished career particularly with respect to law execution and removals. His practice as our nation's fourth President is fully consistent with that view even if he was sometimes an ineffectual leader.

After he left office, in 1817, Madison remained in the unitary executive camp for the rest of his long and productive life. Between 1817 and his death in 1836, Madison staunchly defended the President's removal power at every turn opposing as we shall discuss below the Tenure of Office Act of 1820 (even though it did not limit presidential removal power), and vigorously defending Andrew Jackson's use of the removal power (even though he did not especially like Jackson). Thus Madison, in one letter written in 1834, observed:

The claim, on *constitutional* ground, to a share in the removal as well as appointment of officers, is in direct opposition to the *uniform practice of the Government from its commencement*. It is clear that the innovation would not only vary, essentially, the existing balance of power, but expose the Executive, occasionally, to a total inaction, and at all times to delays fatal to the due execution of the laws.

Another innovation brought forward in the Senate claims for the Legislature a discretionary regulation of the tenure of offices. This, also, would vary the relation of the departments to each other, and leave a wide field for legislative abuses. *The power of removal, like that of appointment, ought to be fixed by the constitution, and both, like the right of suffrage and apportionment of representatives, not be dependent on the legislative will.* . . . But apart from the distracting and dilatory operation of a veto in the Senate on the removal from office, it is pretty certain that the large States would not invest with that additional pre-

201. Like the debates over *Dred Scott* or in 1937 over the constitutionality of the New Deal.

rogative a body constructed like the Senate, and endowed, as it already is, with a share in all the departments of power, Legislative, Executive, and Judiciary. It is well known that the large States, in both the Federal and State Conventions, regarded the aggregate powers of the Senate as the most objectionable feature in the Constitution.²⁰²

Madison repeated these views in other letters written during the same period²⁰³ and an interesting feature of them is that they confirm that his position on presidential removal power, taken as a member of the House of Representatives, may have been motivated in part by an early skepticism about the institution of the Senate.

This fits with everything we know about Madison's views, especially during the critical formative period in 1789. Madison had favored the Virginia Plan at the Philadelphia Convention, under which both Houses of Congress were to be apportioned by population, and he was an ardent nationalist in the 1780s. Accordingly, it should come as no surprise that he would be loath to expand the prerogatives of the Senate over either removals *or over appointments to fill the vacancies thus created*, since the Senate was the most States-oriented institution in the national government. To the extent the Senate represented the States and the presidency was more nationalist, it should come as no surprise that the early Madison would favor a broad presidential removal power given the views he had expressed at the Philadelphia Convention.²⁰⁴

In sum, James Madison was at all times during his long and remarkable career a defender of the unitary executive. This is clear

202. Letter from James Madison to Edward Coles (Oct. 15, 1834), in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 366, 368-69 (emphasis added).

203. *See, e.g.*, Letter from James Madison to Edward Coles (Aug. 29, 1834) ("claims are made by the Senate in opposition to the principles and practice of every administration, my own included, and varying materially, in some instances, the relations between the great departments of the government") (discussing the Andrew Jackson removal debate); Letter from James Madison to John M. Patton (Mar. 24, 1834) ("Should the controversy on removals from office end in the establishment of a share in the power, as claimed for the Senate it would materially vary the relationship among the component parts of the government, and disturb the operation of the checks and balances as now understood to exist.") in *id.* at 354, 355 & 342, 342.

204. Thus Madison wrote in a letter to Edmund Randolph:

I think it best to give the Senate as little agency as possible in Executive matters, and to make the President as responsible as possible in them. . . . I see and *politically feel* that that will be the weak branch of the Government.

Letter from James Madison to Edmund Randolph (May 31, 1789) in 1 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 473.

whether one considers his role in the Philadelphia Convention of 1787, his role in the Decision of 1789, his role as President of the United States, between 1811 and 1817, or his role as a senior statesman writing letters in 1834 a mere two years before his death. It is difficult to imagine how someone could outdo James Madison in consistently and vigorously defending the unitary executive.

E. James Monroe

James Monroe proved to be a stronger President than James Madison, although he lacked the charismatic personality and leadership abilities of Thomas Jefferson.²⁰⁵ He too proved to be a committed believer in the vital importance of a unitary executive structure, although regrettably he did not always follow through to act upon his beliefs.

Monroe's support for the unitary executive and for the importance of administrative hierarchy became evident long before he assumed the presidency. In a letter regarding the Patent Office written in 1812 to Congressman Seybert while Monroe was serving as Secretary of State, the future President wrote:

I have always thought that every institution, of whatsoever nature it might be, ought to be comprised within some one of the departments of Government, the Chief of which only should be responsible to the Chief Executive Magistrate of the Nation. *The establishment of inferior independent departments, the heads of which are not, and ought not to be members of the Administration, appears to me to be liable to many serious objections.*²⁰⁶

Monroe had also championed presidential control in military matters when in 1815, as head of the War Department, he prepared a report for a Senate committee championing unilateral presidential control over the state militias once they had been called into the service of the United States. Two state governors had challenged presidential authority unilaterally to call forth the state militias, a position Monroe described as being "fraught with mischief" and "absurd."²⁰⁷

205. See WHITE, THE JEFFERSONIANS, *supra* note 165, at 38.

206. *Id.* at 74 (quoting Letter from Secretary of State James Monroe to Congressman Adam Seybert (June 10, 1812), in 5 THE WRITINGS OF JAMES MONROE 203 (Stanislaus M. Hamilton ed., 1898-1903)).

207. *Id.* at 541 (quoting 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS 605-06); see

Monroe assumed the presidency in 1817, and his two terms in office were quite successful with the result that the office regained some of the luster it had lost during Madison's indecisive and timorous eight years in office. As President, James Monroe vigorously defended and asserted executive power in a number of contexts, most famously in announcing the Monroe Doctrine which was embodied in his Seventh Annual Message to Congress.²⁰⁸ The Monroe Doctrine was an important statement of American foreign policy, analogous to George Washington's Neutrality Proclamation discussed above, and its unilateral issuance by President Monroe thus suggests his willingness to exercise executive power vigorously in the foreign policy context. Chief Justice Vinson, dissenting in the Steel Seizure Case many years later, observed:

A review of executive action demonstrates that our Presidents have on many occasions exhibited the leadership contemplated by the Framers when they made the President Commander in Chief, and imposed upon him the trust to "take Care that the Laws be faithfully executed." With or without explicit statutory authorization, Presidents have at such times dealt with national emergencies by acting promptly and resolutely to enforce legislative programs, at least to save those programs until Congress could act. Congress and the courts have responded to such executive initiative with consistent approval. . . .

Jefferson's initiative in the Louisiana Purchase, *the Monroe Doctrine*, and Jackson's removal of Government deposits from the Bank of the United States further serve to demonstrate by deed what the Framers described by word when they vested the whole of the executive power in the President.²⁰⁹

Chief Justice Vinson lists the Monroe Doctrine along with other historic unilateral exertions of the executive power because of the important role that Doctrine was to play in defining the future of American foreign policy. It is thus clear that James Monroe, as the

also id. at 539-45.

208. See GEORGE MORGAN, *THE LIFE OF JAMES MONROE* 394, 395-410 (1921). See also James Monroe, Seventh Annual Message to Congress (Dec. 2, 1823), in 2 *MESSAGES & PAPERS*, *supra* note 177, at 776.

209. *Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 683, 685 (1952) (Vinson, C.J., dissenting) (emphasis added).

author of the Monroe Doctrine, was a powerful occupant of the Chief Executive Office who knew well how to exercise vigorously the executive power in the foreign policy sphere.²¹⁰

While Monroe was more cautious with domestic policy matters, he did on occasion assert presidential prerogatives. Leonard White reports that Monroe on two occasions expressed the view that the President ought to be able to control executive branch communications to Congress. First, in 1819, the House of Representatives asked Secretary of War John Calhoun for his opinion on building some roads and canals for allegedly military purposes. Calhoun was known to favor such internal improvements, while Monroe was known by the House to believe that the federal government lacked constitutional power to undertake them. The issue thus arose "whether department heads in making reports to Congress had a responsibility to reflect the opinions of the President rather than their own."²¹¹ As reported by Secretary of State John Quincy Adams:

[Monroe] expressed an opinion that the call of the House directly upon the Secretary of War for this report was itself irregular, and not conformable to the spirit of the Constitution of the United States, *the principle of which was a single Executive*. . . . And as the heads of Departments were executive officers under the President, it was to be considered whether the President himself was not responsible for the substance of their reports.²¹²

The matter arose again in 1820 when Monroe and Adams complained about Secretary of the Treasury Crawford's transmission of annual estimates directly to Congress without first sharing the financial program with Monroe. This practice, which had been followed by all the early Treasury Secretaries since Hamilton, was viewed by both Adams and Monroe as being unconstitutional. Leonard White reports:

210. This is consistent with Monroe's behavior as Governor of Virginia. One biographer reports that Monroe and the Republican governor of Pennsylvania were ready in 1801 to use military force on Thomas Jefferson's behalf if the Federalists had used the deadlock in the Electoral College as an excuse not to let the House of Representatives elect a Republican President. MORGAN, *supra* note 208, at 219-220.

211. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 67.

212. *Id.* at 68 (quoting Entry for January 12, 1819, 4 MEMOIRS OF JOHN QUINCY ADAMS 217 (Charles Francis Adams ed., 1874-77) (emphasis added)).

[Adams] thought the practice "altogether inconsistent with the spirit of the Constitution," and one that "ought immediately to be changed." Monroe asked Adams to look into the law and expressed his own opinion that the practice was wrong.²¹³

For whatever reason, nothing was done to correct this practice, but there can be little doubt that Presidents Monroe and John Quincy Adams objected to it. Leonard White is plainly right that Monroe was concerned that there be "left no loose ends of administration unconnected with the departments and independent of presidential direction."²¹⁴

Monroe also asserted his belief in the hierarchy of command in an exchange of views with then-General Andrew Jackson, who for a time attempted to object to orders being issued directly to his subordinates by the War Department. Monroe pointedly reminded Jackson that the "orders of the [war] dept are . . . the orders of the President" and according "to my view of the subject, no officer of the army, can rightfully disobey, an order from the President." Monroe went on to agree with Jackson that the War Department should not ordinarily communicate with Jackson's army while bypassing him as the commanding general of it.²¹⁵

Finally, Monroe maintained supremacy over the administration by exercising the presidential removal power, albeit in a gingerly and tepid fashion. Leonard White notes that "Monroe . . . removed twenty-seven civil officers in his eight years in the White House. One-third were in the foreign service, all consuls with a single exception; one-third were collectors of revenue."²¹⁶ Although, according to John Quincy Adams, Monroe was too hesitant to use his power to remove,²¹⁷ and although he plainly did not exercise the removal power often or in major cases, he did in fact exercise the power, and an opinion issued by Attorney General William Wirt acknowledged that "the power of the President to dis-

213. *Id.* at 69 (quoting Entry for January 8, 1820, 4 *Memoirs of John Quincy Adams*, *supra* note 212, at 501); *see also id.* at 68-69.

214. *Id.* at 74.

215. *Id.* at 241-45 (quoting Letter from James Monroe to Andrew Jackson, 2 *CORRESPONDENCE OF ANDREW JACKSON* 329-31 (John Spencer Bassett ed., 1926-35)).

216. *Id.* at 379-80; *see also* McDONALD, *AMERICAN PRESIDENCY*, *supra* note 20, at 255.

217. *See* WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 380 (quoting 5 *THE MEMOIRS OF JOHN QUINCY ADAMS*, *supra* note 212, at 158).

miss . . . , at pleasure, is not disputed.”²¹⁸ When we remember that Monroe reached the White House at a time when the Republicans had been in office for sixteen years, it is perhaps not so surprising that there were few removals. By 1817, most federal officials in office had been appointed by Monroe’s good friends and neighbors Thomas Jefferson and James Madison.

The Monroe Administration did bear witness to the first event that even arguably could be said to support a historical practice of presidential tolerance of any deviation whatsoever from the theory of the unitary executive (more than three decades after the Constitution of 1787 had been adopted), when Congress enacted the first substantial limitation on presidential control of federal patronage: the Tenure of Office Act of 1820. Passed without any significant debate, the 1820 Act provided that executive officers serving outside of Washington, D.C., “shall be appointed for terms of four years, but shall be removable from office at pleasure.”²¹⁹ The Act was vigorously and firmly denounced by former Presidents Jefferson and Madison. Jefferson warned:

It saps the constitutional and salutary functions of the President, and introduces a principle of intrigue and corruption, which will soon leaven the mass, not only of Senators, but of citizens. It is more baneful than the attempt which failed in the beginning of the government to make all officers irremovable, but with the consent of the Senate. It will

218. 2 Op. Att’y Gen. 67 (1828).

219. Tenure of Office Act, ch. 102, sec. 1, 3 Stat. 582, 582 (1820). Specifically, the Act applied to “all district attorneys, collectors of the customs, naval officers and surveyors of the customs, navy agents, receivers of public moneys for lands, registers of the land offices, paymasters in the army, the apothecary general, the assistant apothecaries general, and the commissary general of purchases.” *Id.*

Although the Act was supposed to bring the pro-democratic benefits of “rotation in office” to the federal government, many historians have concluded that support for the Act was in reality driven by the presidential ambitions of Treasury Secretary William H. Crawford. According to some historians, Crawford proposed the Tenure of Office Act because he believed that the Act would foster his planned presidential bid by giving him greater influence over federal patronage. The Senate went along with Crawford because, by requiring the more frequent exercise of the Senate’s confirmation power, the Act increased its power as well. 1 GOLDSMITH, *supra* note 125, at 167. Historians are far from unanimous in supporting this conclusion. See JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE* 51-52 (1968) [hereinafter HARRIS, *ADVICE AND CONSENT*] (comparing 7 MEMOIRS OF JOHN QUINCY ADAMS at 424-25 with FISH, *supra* note 77, at 65-70); VAN RIPER, *supra* note 77, at 25; WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 388-89 (comparing Carl R. Fish, *The Crime of W.H. Crawford*, 21 AM. HIST. REV. 545-56 (1915-16) with CHARLES M. WILTSE, JOHN C. CALHOUN: NATIONALIST 211 n.1 (1944)).

keep in constant excitement all the hungry cormorants for office, render them, as well as those in place, sycophants to their Senators, engage these in eternal intrigue to turn one out and put in another, in cabals to swap work, and make of them what all executive directories become, mere sinks of corruption and faction.²²⁰

Madison responded in kind: "The law . . . is pregnant with mischiefs such as you describe. . . . If the error be not soon corrected, the task will be very difficult; for it is of a nature to take a deep root."²²¹ Furthermore, although the Act did not directly place any limits on the President's removal power, Madison was concerned that, if carried to its logical conclusion, it would lead to such limits. In his view, if a law could displace an officer every four years, "it can do so at the end of every year, or at every session of the Senate; and the tenure will then be the pleasure of the Senate as much as of the President, and not of the President alone."²²² Moreover, Madison was concerned that in light of the Decision of 1789, the inclusion of language providing that these officers "shall be removable from office at pleasure"²²³ implied that the removal power was conveyed by congressional, rather than constitutional, grant.

Although Monroe signed the bill into law without objection, he later came to share Madison's concerns. As then-Secretary of State

220. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 388 (quoting 15 *THE WRITINGS OF THOMAS JEFFERSON*, *supra* note 129, at 294-95); *see also* 1 GOLDSMITH, *supra* note 125, at 167; McDONALD, *AMERICAN PRESIDENCY*, *supra* note 20, at 256.

221. Letter from James Madison to Thomas Jefferson (Dec. 10, 1820), in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON* *supra* note 129, at 196, *quoted in* WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 389; *see also* 1 GOLDSMITH, *supra* note 129, at 192-93; VAN RIPER, *supra* note 77, at 25.

222. Letter from James Madison to President Monroe in 3 *LETTERS AND OTHER WRITINGS OF JAMES MADISON*, *supra* note 129, at 199, 200; *see also* Fisher, *Removal Power*, *supra* note 21, at 65. Madison had voiced a similar view during the Decision of 1789. *See* Ruth Weissbourd Grant & Stephen Grant, *The Madisonian Presidency*, in *THE PRESIDENCY IN THE CONSTITUTIONAL ORDER* 31, 53, 63 n.70 (Joseph M. Bessette & Jeffrey Tulis eds., 1980).

223. Tenure of Office Act, sec. 1, 3 Stat. at 582; *see also* CORWIN, *PRESIDENT'S REMOVAL POWER*, *supra* note 127, at 345-46; 1 GOLDSMITH, *supra* note 125, at 167-68. However, the settled practice since the Decision of 1789 essentially foreclosed any such an implication, and it is just as likely that this statutory language represents Congress's recognition that the removal power was constitutionally vested in the President. FISHER, *CONSTITUTIONAL CONFLICTS*, *supra* note 125, at 58 (referring to the removal provision as a "stipulation"). *See generally* WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 388-89; Fisher, *Removal Power*, *supra* note 21, at 65.

John Quincy Adams wrote in his memoirs, "Mr. Monroe unwarily signed the bill without advert[ing] to its real character. He told me that Mr. Madison considered it as in principle unconstitutional. . . . Mr. Monroe himself inclined to the same opinion, but the question had not occurred to him when he signed the bill."²²⁴ These concerns led Monroe to make it his policy to renominate all honest executive officials when their commissions expired, ensuring that the Act would have little immediate impact.²²⁵

The significance of Monroe's initial acceptance of the first Tenure of Office Act should not be overstated. In fact, the Act's establishment of fixed terms for certain federal officials only implicated the removal power tangentially and did not purport to limit the removal power in any way.²²⁶ The fact that Monroe voiced his objections to the bill as soon as he became aware of the threat to the removal power posed by the Act also indicates that Monroe's initial silence stemmed more from inadvertence than acquiescence. Finally, any remaining questions about Monroe's willingness to protect the President's power to remove were erased in 1824, when Monroe refused to comply with a House request to provide the documents connected with the suspension of a naval officer as an improper interference with executive functions.²²⁷ Together, these considerations effectively vitiate any inference that, in initially failing to object to the Tenure of Office Act, Monroe acquiesced to any infringement on the President's power to remove.

Finally, it must be noted that President Monroe's Attorney General, William Wirt, compiled a somewhat equivocal record on some of the other aspects of the unitary executive. Before describing that record, it should be noted in Wirt's (and Monroe's) defense that Wirt was by far the most successful and powerful Attor-

224. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 388 (quoting Entry for Feb. 7, 1828, 7 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 212, at 424-25); *see also* 1 GOLDSMITH, *supra* note 125, at 192-93; VAN RIPER, *supra* note 77, at 25.

225. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 389; Goldsmith, *supra* note 125, at 192-93; HARRIS, *ADVICE AND CONSENT*, *supra* note 219, at 52; Carl R. Fish, *Removal of Officials by the Presidents of the United States*, 2 ANN. REP. AM. HIST. ASS'N 67, 72 (1899).

226. *See* *Parsons v. United States*, 167 U.S. 324, 339 (1897).

227. James Monroe, Message to the House of Representatives (Jan. 10, 1825), in 2 MESSAGES & PAPERS, *supra* note 177, at 847; *see also* Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755, 759 (1959).

ney General the nation had had up until that point. Wirt created many of the most important traditions and institutions that surround the office of the Attorney General, and he helped to lay the groundwork for the eventual creation of the Department of Justice many, many decades later.²²⁸ A lack of resources and a cautious personality may have prevented Wirt from doing even more, and may have contributed to his tendency to decline power that he lacked the resources to exercise, but William Wirt nonetheless deserves enormous credit for putting the Attorney General on an equal footing with the other three principle Cabinet Secretaries.²²⁹ James Monroe deserves some of this credit as well, for the elevation in stature of the Attorney General was an important development with long term implications for the theory of the unitary executive. It could not have occurred without both Monroe's support and his selection of so able and energetic a lawyer as William Wirt to hold the office.

Nonetheless, as indicated above, Wirt's record with respect to the unitary executive was at times equivocal. Thus, in 1823, General Wirt issued an opinion that challenged the President's authority to direct the actions of accounting officers in advance and to review their exercise of discretion after the fact.²³⁰ This opinion, some scholars have suggested, is inconsistent with a unitarian view of presidential power.²³¹

228. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 346.

229. *See id.*

230. Wirt argued "it could never have been the intention of the constitution, in assigning this general power to the President to take care that the laws be executed, that he should in person execute the laws himself." While the Take Care Clause did "place[] the officers . . . under [the President's] general superintendence," it only authorized the President to displace, prosecute, or impeach officials who fail to execute the law properly; it did not grant to the President with the "power to interfere" with those officials' actions. Wirt believed that requiring the President "to take upon himself the responsibility of all the subordinate executive officers of the government" represented "a construction too absurd to be seriously contended for." Wirt continued,

If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself. The constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully.

1 Op. Att'y Gen. 624, 625 (1823). Wirt relied upon the authority of this opinion to reject summarily subsequent requests for presidential intervention in matters before accounting officials. *See* 1 Op. Att'y Gen. 705-06 (1825); 1 Op. Att'y Gen. 678 (1824); 1 Op. Att'y Gen. 636-37 (1824).

231. *See* Ledewitz, *supra* note 21, at 799; Froomkin, Note, *supra* note 6, at 801 &

It is far from clear, however, that this opinion properly constitutes a definitive disavowal of the unitary executive. First, the opinion's reasoning is incomplete in that it only analyzed the presidential review of subordinates' actions under the Take Care Clause without considering the impact of the Executive Power Clause.²³² Furthermore, whether this record can be fairly attributed to Monroe is certainly subject to debate. A position taken in an Attorney General's opinion does not necessarily represent the official position of an Administration, and Presidents have often ignored positions taken by their Attorneys General and substituted their own judgment instead.²³³

But by far the biggest problem with interpreting this opinion as a firm rejection of the unitary executive is that so interpreting it conflicts with a number of Wirt's other opinions on executive power. For example, just seven months before authorizing this opinion, Wirt had issued another opinion taking a contrary position with regard to the power of presidential review. Specifically, Wirt opined that a law authorizing accounting officers to settle the accounts of the Vice President were "subject to the *revision* and *final decision* of the President." Under the specific statute, "the accounting officers must act on the subject in the first instance; the power of the President being merely in the nature of appellate power; and that, consequently, he cannot, in the regular execution of the law, put those officers aside, and take the whole subject at once into his own hands." Nonetheless, Wirt emphasized that once the accounting officers had acted, their decisions remained subject to the President's "revising power."²³⁴ It is even more difficult to reconcile the first opinion discussed with an opinion issued by Wirt in 1827 affirming the President's right to direct federal district attorney's prosecution of a particular suit. Wirt "entertain[ed] no doubt of the constitutional power of the President to order the discontinuance of a suit commenced in the name of the United States in a case proper for such order." In fact, if the suit lacked a proper legal basis, the Take Care Clause "not only authorized, but

n.75, 805 & n.111.

232. See Liberman, *supra* note 3, at 337 & n.156.

233. See Nelson Lund, *Lawyers and the Defense of the Presidency*, 1995 B.Y.U. L. REV. 17, 27 & n.24 [hereinafter Lund, *Lawyers*] (citing examples when Presidents overruled their Attorneys General); Nelson Lund, *Rational Choice at the Office of Legal Counsel*, 15 CARDOZO L. REV. 437, 443-45 (1993) [hereinafter Lund, *Rational Choice*].

234. 1 Op. Att'y Gen. 596, 597-98 (1823).

required [the President] by his duty, to order a discontinuance of such vexation.”²³⁵ This 1827 opinion is particularly problematic for the critics of the unitary executive who have argued that the Comptroller of the Treasury was independent of the President²³⁶ and that giving the Comptroller the power to prosecute certain suits²³⁷ was an early example of the fragmentation of the unitary executive.²³⁸ Wirt’s opinion clearly suggests that the President had full power to direct the actions of the Comptroller and that giving the Comptroller authority over some types of cases did not vitiate the President’s control over federal prosecutions.

Wirt did not make any attempt to reconcile his various opinions,²³⁹ and subsequent Attorney General Opinions have vacillated on this point ever since.²⁴⁰ Fortunately, the methodology of coordinate construction relieves us of the need to do so. For our purposes, it is sufficient to note that even if the views expressed in Wirt’s opinions are attributed to the President and are read for all they are worth, they still fall far short of establishing an extended pattern of presidential acquiescence to a non-unitary executive branch.

235. 2 Op. Att’y Gen. 53, 54 (1827). Wirt concluded in this particular case such a direction would have been inappropriate since a court had granted the prosecutor’s request for an injunction in this case over two years before. *Id.* at 54-56. Had the matter not been already decided by a court of law, however, there is little doubt that Wirt would have endorsed dismissal of the suit.

236. See Bloch, *supra* note 16, at 578 n.55; Lessig & Sunstein, *supra* note 6, at 27; Tiefer, *supra* note 21, at 73-74.

237. In 1797, Congress gave the Comptroller the power “to institute suit for the recovery of” a “sum or balance reported to be due to the United States.” Act of Mar. 3, 1797, ch. 20, sec. 1, 1 Stat. 512, 512. In 1817, Congress gave the Comptroller the power “to direct suits and legal proceedings, and to take all such measures as may be authorized by the laws, to enforce prompt payments of all debts to the United States.” Act of Mar. 3, 1817, ch. 45 sec. 10, 3 Stat. 366, 367.

238. See Krent, *Executive Control*, *supra* note 105, at 288; Lessig & Sunstein, *supra* note 6, at 17-18; Tiefer, *supra* note 21, at 75.

239. Wirt’s two opinions concerning the direction of accounting officers may be distinguished in that the second opinion dealt with the general accounting laws while the first involved special legislation. Thus differences in the availability of presidential review arguably could have flowed from differences in congressional intent. See 2 Op. Att’y Gen. 625 (1834) (discussing this distinction without referring to either of Wirt’s opinions). This resolution, however, still fails to provide an adequate explanation of Wirt’s opinion on the President’s power to direct district attorneys.

240. See P. Strauss, *supra* note 3 at 605 & n. 24.

F. John Quincy Adams

John Quincy Adams was, like his father, a strong believer in the value of a hierarchical, unitary executive branch. Thus, Adams was (according to Leonard White) "temperamentally a man to restore the presidency to its original high estate."²⁴¹ White elaborates:

[T]he last of the Jeffersonians in the White House, John Quincy Adams, was in truth more nearly a Federalist than a Republican. His political doctrines resembled those of Alexander Hamilton, and his ideals of administration were those of George Washington and his father, John Adams.²⁴²

Adams's support for executive unitariness surfaced long before he entered the White House. While serving as Secretary of State during the Monroe Administration, Adams reportedly wrote to his wife that:

For myself I shall enter upon the functions of my office with a deep sense of the necessity of union with my colleagues, and with a suitable impression that my place is *subordinate*. That my duty will be to *support*, and not to counteract or oppose, the President's administration, and that if from any cause I should find my efforts to that end ineffectual, it will be my duty seasonably to withdraw from the public service.²⁴³

As noted earlier, Adams had also sided in 1819 with President Monroe in the dispute over whether department heads could appropriately make reports to Congress which disagreed with the president's constitutional interpretations. Adams reports in his memoirs that he thought "there would be an obvious incongruity and indecency that a head of Department should make a report to either House of Congress which the President should disapprove."²⁴⁴

241. WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 41.

242. *Id.* at vii-viii.

243. *Id.* at 61-62 (quoting Letter from John Quincy Adams to Abigail Adams (May 16, 1817), in 6 *THE WRITINGS OF JOHN QUINCY ADAMS* 179, 182 (Worthington Chauncey Ford ed., 1913-17)).

244. *Id.* at 68 (quoting 4 *THE WRITINGS OF JOHN QUINCY ADAMS*, *supra* note 212, at 217 (quoting Entry for January 12, 1819 in *THE MEMOIRS OF JOHN QUINCY ADAMS*, *supra* note 212, at 217)).

Adams continued to adhere to these positions after he ascended to the Presidency. After giving an inaugural address that was "Federalist in its conception,"²⁴⁵ Adams insisted on the same degree of loyalty from his own Cabinet members that he had shown Monroe. And in 1825 when he asked a former rival from Monroe's Cabinet, William Crawford, to stay on as Secretary of the Treasury, Crawford declined due to irreconcilable policy disagreements.²⁴⁶ Moreover, consistent with the advice Adams had given Monroe, Adams refused to disclose secret information to a friendly Congressman, indicating that he was forbidden from doing so by the Constitution.²⁴⁷ John Quincy Adams was clearly deeply and personally committed to the core principles of a unitary and independent executive branch.

Adams effectuated those principles by continuing the moderate reappointment and removal practices of Monroe while echoing Jefferson's criticisms of the Senate's attempts to influence federal patronage. As Adams noted:

Efforts have been made by some of the senators to obtain different nominations, and to introduce a principle of change or rotation in office at the expiration of these commissions, which would make the government a perpetual and unintermitting scramble for office. . . . A more pernicious expedient could scarcely have been devised. . . . I determined to renominate every person against whom there was no complaint which would have warranted his removal.²⁴⁸

The fact that Adams was reluctant to use his control of federal patronage for political purposes, however, did not suggest that he questioned the constitutional basis of the President's power to remove. Indeed, Adams did remove twelve officials during his four years in office.²⁴⁹ Adams's presidency, however, never recovered from the circumstances of his election,²⁵⁰ and his midterm con-

245. *Id.* at 41.

246. See WHITE, THE JEFFERSONIANS, *supra* note 165, at 64.

247. *Id.* at 41 (citing Entry for March 15, 1828, in 7 MEMOIRS OF JOHN QUINCY ADAMS, *supra* note 212, at 475).

248. HARRIS, ADVICE AND CONSENT, *supra* note 219, at 52 (citing JOHN T. MORSE, JOHN QUINCY ADAMS, 178-79 (1898) for the Adams quote); see also 1 GOLDSMITH, *supra* note 125, at 192-93; WHITE, THE JEFFERSONIANS, *supra* note 165, at 389-90.

249. See WHITE, THE JEFFERSONIANS, *supra* note 165, at 380; McDONALD, AMERICAN PRESIDENCY, *supra* note 20, at 255.

250. In the election of 1824, then Senator Andrew Jackson received 131 electoral votes,

gressional elections left him without influence over Congress both Houses of which were won for the first time by the president's opponents.²⁵¹ Given his lack of political support, Adams was understandably cautious in exercising his presidential prerogatives notwithstanding his firm belief in them.

By the second half of the Administration of John Quincy Adams, however, Congress began showing renewed interest in placing limits on the President's removal power. In 1826, a Senate select committee on executive patronage reported a bill proposing "[t]hat, in all nominations made by the President to the Senate, to fill vacancies occasioned by an exercise of the President's power to remove from office, the fact of the removal shall be stated to the Senate . . . with a statement of the reasons for which such officer may have been removed."²⁵² Motivated more by the next election than a desire to curtail presidential power,²⁵³ the Report attempted to evade the serious constitutional questions raised by these proposals by adopting a functionalist view of the Constitution, in which deviating from the specific proscriptions of the Constitution was justified so long as those deviations complied with "the spirit of the constitution in laboring to multiply the guards and to strengthen the barriers, against the possible abuse of power."²⁵⁴ In the committee's opinion, this more dynamic view of the Constitution was mandated by changed circumstances:

[T]he Committee cannot imagine that the jealous foresight of the time, great as it was, or that any human sagacity, could have foreseen, and placed a competent guard upon, every possible avenue to abuse of power. The nature of a

while Adams received 99, William Crawford 41, and House Speaker Henry Clay 37. Since no candidate received a majority of the electoral vote, under the Twelfth Amendment the President was to be selected by the House from among the top three candidates. Although no longer able to stand as a candidate, as Speaker Clay was able to exert substantial influence over the election. In the "Corrupt Bargain," Clay was able to engineer Adams's election. In return, Adams named Clay Secretary of State, the post then considered to be the stepping stone to the Presidency. Thus, as a minority President, Adams always struggled against questions about the legitimacy of his election and general lack of political support.

251. See WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 42.

252. S. DOC. NO. 88, 19th Cong., 1st Sess. 14-15 (1826), *reprinted in* 2 CONG. DEB. app. 133 (1826). The committee also proposed that military officers' commissions "continue in force during . . . good behaviour," and that such officers be only dismissed pursuant to a court martial or by congressional action. *Id.*

253. See WHITE, *THE JEFFERSONIANS*, *supra* note 165, at 391, 393.

254. S. DOC. NO. 88, *supra* note 252, at 2.

constitutional act excludes the possibility of combining minute perfection with general excellence. After the exertion of all possible vigilance, something of what ought to have been done, has been omitted, and much of what has been attempted, has been found insufficient and unavailing in practice.²⁵⁵

The Senate adjourned without acting on this proposal. Nonetheless, the debate on the Benton Report foreshadowed the more serious challenges to the President's removal power yet to come.²⁵⁶

By the end of John Quincy Adams's Administration, it was clear that the strong, unitary presidency created by Washington, Hamilton, and John Adams had survived the Jeffersonian period largely intact. As Leonard White argues:

The Jeffersonian era in the field of administration was in many respects a projection of Federalist ideals and practice. The political differences between Jefferson and Hamilton turned out to be much more profound and significant than their differences in the manner and spirit of conducting the public business. Jefferson and Gallatin, moreover, inherited a going concern, and it developed that a brief twelve years had been enough to set patterns that persisted throughout the next thirty. The Federalists disappeared as a political party, but their administrative system was adopted by their political rivals.²⁵⁷

White concludes:

[N]o doubt arose in the minds of the Jeffersonians concerning the administrative supremacy of the President. The department heads were responsible to him. The executive power remained where the Constitution had placed it.²⁵⁸

255. *Id.* Curiously, the Report's reliance on dynamic constitutional theory is inconsistent with its proposal of two constitutional amendments to create the proper balance between executive and legislative control of federal patronage, which recognizes that the proper way to adapt the Constitution to contemporary exigencies is by amending it. As the Report emphasizes, "The people *made* the Constitution, and they can *amend* it. They are the only constitutional triers of the amendment. They alone have the power to adopt it. . . ." *Id.* at 12 (emphasis in original).

256. See WHITE, THE JEFFERSONIANS, *supra* note 165, at 393.

257. *Id.* at vii.

258. *Id.* at 76.

Thus, by 1829, exclusive presidential power over law execution had already been firmly established, even as one of the strongest presidencies in American history was getting ready to begin.

G. Andrew Jackson

Andrew Jackson was one of the most powerful presidents in American history, and he clearly in some respects transformed and enhanced the high office he held. In his development of the President's role as the leader of a political party and in the vigor with which he pressed the President's claim to be a direct representative of the people, Jackson clearly trod new ground. He also trod new ground in the energy with which he used the veto power, especially in cases where he disapproved of bills on policy grounds rather than for constitutional reasons. Finally, he used the president's removal power and powers over law execution much more vigorously than they had ever been used before, and he endorsed a new principal of the desirability of rotation in office that was clearly contrary to the policy views held by his predecessors who had favored stability in administration as a core value. From the point of view of many political scientists and historians, then, the Jackson administration marks not the end of the Founding period but rather a new beginning—the start of a period that culminates in the strong modern presidencies that have characterized much of the twentieth century.

We do not disagree with the view that Jackson greatly enhanced the office of the presidency by providing people with an example of the leadership role that strong presidents can play. We adamantly disagree, however, with the entirely different claim, advanced most recently by Professors Lessig and Sunstein,²⁵⁹ that the Jackson Administration marked the advent of some new legal role for the president where for the first time presidents acquired power over law execution by the whole of the executive branch, including the Treasury Department and the Post Office. From the perspective of a constitutional lawyer, the Jackson Administration was not a new beginning: it was a reaffirmation of the victories won by James Wilson and James Madison at the Philadelphia Convention—victories that were acknowledged by the First Congress in the Decision of 1789 and by all of Jackson's six predecessors in the White House.

259. See Lessig & Sunstein, *supra* note 6, at 78.

It was for this reason that James Madison himself *agreed* with Andrew Jackson's legal claims during the Bank War even though he disliked Jackson and disapproved of many of his policies. Madison, of course, wrote in 1834 that "[t]he claim, [of the Senate] on constitutional ground, to a share in the removal, as well as appointment of officers, [is] in direct opposition to *the uniform practice of the government from its commencement*."²⁶⁰ He also described the Senate's position as being "in opposition to the principles and *practice of every administration, my own included*."²⁶¹ Presumably, former President James Madison was in a better position to judge the prior presidential practice in 1834 than are Professors Lawrence Lessig and Cass Sunstein writing today, especially in a situation where his political views were hostile to the administration in power.

The key error, then, committed by those anti-unitarians who view the Jackson presidency as transformative is to confuse the separate issues of whether Jackson's presidency was transformative legally or politically. With respect to the legal matters we have been discussing in this Article, Jackson's presidency was a reaffirmation of claims made and settled long before: Old Hickory broke no new legal ground in his assertions about presidential control over law execution.

In discussing the relevance of the Jackson presidency for the unitary executive debate, we think it is useful to divide our analysis into three sections: the first section focusses on Jackson's claims about the role of the president and his place in our constitutional system; the second section describes Jackson's views and practice on presidential powers of removal and supervision of law execution; and the third section illustrates the points discussed in the first two sections by describing briefly the history of Jackson's famous and successful war to kill the Bank of the United States.

1. Jackson's Claims about the Role of the President in Our Constitutional System

Andrew Jackson vigorously articulated and defended what Leonard White has called the Doctrine of Direct Representation.²⁶² He argued that the President is the direct representative

260. See Letter from James Madison to Edward Coles (Oct. 15, 1834) in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 368 (emphasis added).

261. Letter from James Madison to Edward Coles (Aug. 29, 1834) in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON, *supra* note 129, at 355 (emphasis added).

262. See LEONARD B. WHITE, THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY

of the whole people of the United States and that the Cabinet Secretaries are not.²⁶³ Presidential power over the Cabinet Secretaries follows easily from this point as does some degree of presidential authority relative to Congress. Obviously, the president ordinarily has something of an electoral mandate from the people, while members of Congress in 1829 had a mandate only from their districts and Senators from the legislature of their home state.

Jackson's theory built upon solid antecedents. James Wilson had argued during the Pennsylvania Ratifying Convention that the method of electing the president made him "the MAN OF THE PEOPLE," as McDonald describes, "the one governmental official who was elected to represent the entire country."²⁶⁴ Similarly, Washington and Jefferson had emphasized the president's independent electoral connection with the people. Nonetheless, Jackson stressed this aspect of presidential legitimacy more heavily and more publicly than had anyone before him, no doubt because of his loss to John Quincy Adams in the House of Representatives in 1825, and he repeatedly called for a constitutional amendment providing for direct election of the President.²⁶⁵

Jackson's emphasis on the president's role as direct representative of the people reinforced every other claim of presidential power he asserted. Vetoes for policy reasons, removals of recalcitrant Cabinet Secretaries, arguments for a presidential power of constitutional interpretation—all of these claims of presidential power were buttressed by the claim of democratic legitimacy that Andrew Jackson advanced once he gained the office that had been "stolen" from him in 1825.

The net effect of Jackson's claims of presidential power was to bring together his opponents into a new political party called the "Whig" party. The name was adopted to signify the party's "opposition to concentrated power in the hands of the chief executive"²⁶⁶ (the similarly named Whig Party in England having helped to lead the Glorious Revolution of 1688 and having opposed royal prerogatives). The newly formed Whigs adopted oppo-

1829-1861 23-28 (1954).

263. *See id.*

264. McDONALD, *supra* note 20, at 201.

265. *See* WHITE, THE JACKSONIANS, *supra* note 262, at 23.

266. ROBERT V. REMINI, ANDREW JACKSON AND THE BANK WAR 129 (1967) [hereinafter REMINI, BANK WAR].

sition to executive power as a core plank of their program,²⁶⁷ and it was the Whigs who for the first time in the 1830s and 1840s adopted the view (as do Lessig and Sunstein) that the power of the sword and the purse ought to be entirely separate²⁶⁸ and that the Treasury Department should be independent of presidential control. Indeed, William Henry Harrison, the first Whig president, said in his inaugural address that “the framers of the Constitution committed a great error in not making the head of the Treasury Department ‘entirely independent of the Executive’[, and he] accepted the Clay-Calhoun doctrine that a President should communicate the reasons for making removals, at least of the Secretary of the Treasury.”²⁶⁹ Leonard White describes the Whigs as being so opposed to Jackson and to executive power “that they *outdid the most timorous Republicans* of earlier years.”²⁷⁰

Andrew Jackson’s Democratic Party triumphed over the Whig opposition at almost every turn during the period between 1829 and 1837. Indeed, during the entire period between 1829 and 1861 the Jacksonian Democrats won the presidency six times and the Whigs won only twice. Both of the two Whigs who won the presidency died in office and one was succeeded after only one month in office by a man, John Tyler, who was “an old-school Democrat.”²⁷¹ The Whigs were completely ineffectual politically as a presidential party and, during the brief periods they held the presidency, they tended to abandon their anti-executive power views.²⁷² The main significance, then, of the Whig opposition to “King Andrew I” (Jackson’s nickname) was that it had no success with the public during Jackson’s administration or at any point thereafter.

In defending presidential power, Andrew Jackson argued vehemently for a presidential role in constitutional interpretation. Like

267. See WHITE, THE JACKSONIANS, *supra* note 262, at 46-49.

268. Leonard White observes: “The specific Whig reaction to Jackson’s removal of the deposits from the United States Bank was to demand ‘the separation of the purse from the sword.’” WHITE, THE JACKSONIANS, *supra* note 262, at 43. White goes on to quote John Tyler, William Henry Harrison’s Vice President and successor, as saying that “I deem it of the most essential importance that a complete separation should take place *between the sword and the purse.*” *Id.*

269. *Id.* at 47.

270. *Id.* at 46 (emphasis added).

271. *Id.* at 6.

272. We will discuss and defend this point in the second Article in our four part series, which will discuss the unitary executive debate during the second half-century of American history.

Thomas Jefferson, James Madison, and George Washington before him, Jackson believed that the President was a co-equal constitutional interpreter to the Supreme Court with an obligation independently to assess questions of constitutionality. He expressed his views eloquently in his Veto Message of July 10, 1832 wherein he vetoed the attempt to renew the Charter of the Bank of the United States:

It is maintained by the advocates of the bank that its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court. To this conclusion I cannot assent. Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.

* * * *

The Congress, the Executive, and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval as it is of the supreme judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.²⁷³

Jackson's defense of the presidential role in constitutional interpretation is obviously sweeping. It is also of great importance because it was made in so important (and fateful) a Veto Message. His position may have manifested itself again in his failure to take any action to enforce Chief Justice Marshall's decision in *Worcester v. Georgia*,²⁷⁴ which sought to give the Cherokee Indians the benefit of the treaty rights they had negotiated with the federal govern-

273. Veto Message of July 10, 1832, in 3 MESSAGES & PAPERS, *supra* note 177, at 1139, 1144-45.

274. 6 Peters 515 (1832).

ment.²⁷⁵ It was with respect to this case that Jackson was reputed to have said, "Well, John Marshall has made his decision now let him enforce it."²⁷⁶

Jackson also defended presidential power in two other ways that bear on the unitary executive debate. First, his Protest, delivered during the Bank War and discussed below, specifically endorses the view that the Executive Power Vesting Clause of Article II was a grant of power and not a mere designation of office and title. This, of course, puts Jackson squarely in the same camp with Hamilton, Jefferson, and Madison, all of whom as we have seen took that position. Second, Jackson's vigorous use of the veto power on both constitutional and policy grounds left little doubt that the President would forcefully defend the prerogatives of his office from congressional attempts to impair them by, for example, curtailing presidential removal power.²⁷⁷ Such proposals were advanced by the Whigs in 1834 and actually passed in the Whig-controlled Senate, only to be killed off in the House of Representatives, which was then held by the Democrats.²⁷⁸

2. Jackson, the Removal Power, and the President's Power to Execute the Laws

Andrew Jackson vigorously defended presidential power in the direct context of removal authority and authority to control the execution of the laws by his subordinates. His legal position on these matters was uncompromising and was founded upon the generally shared understanding at the time of the powers that text *and practice* had recognized as presidential prerogatives. As Leonard White reports:

To the constitutional argument against . . . free use of the removal power, Jackson's friends said flatly that the issue was settled; [Daniel] Webster himself had said it for them, indeed, better than they, although he proposed to reopen what he believed to be an erroneous interpretation of the

275. See SMITH, *supra* note 174, at 516-18.

276. *Id.* at 518. Smith agrees with the received view that Jackson probably did not make the statement at least in this form, and he notes that at this point Jackson did not have a responsibility to enforce the Court's judgment.

277. See WHITE, THE JACKSONIANS, *supra* note 262, at 28-33. Jackson used the veto far more often than his predecessors, and he greatly expanded the use of the veto for pure policy reasons. Jackson also originated the use of the pocket veto. *Id.*

278. See *id.* at 40-42.

Constitution: *an interpretation, he admitted "settled by construction; settled by precedent; settled by the practice of the Government; and settled by statute."*²⁷⁹

Jackson had no doubt about his legal power to remove subordinate officials, and all of the individuals he removed (including Treasury Secretary Duane) complied readily with his orders dismissing them. The Whig opposition sought to change matters, but Jackson prevailed in his removal policy at every turn.

Jackson vigorously exercised the full legal powers that text and practice conferred. Indeed, he exercised his legal powers of removal in a genuinely new and aggressive way.²⁸⁰ In doing this, Jackson was guided by a firm belief in what he called the benefits of "rotation in office"²⁸¹—what we would call term limits. Jackson believed that "rotation in office" would democratize the government and improve the quality of the administration by limiting opportunities for corruption and laziness in public life.²⁸² He thus rejected the Federalist and Jeffersonian preference for a permanent and professional civil service.²⁸³ Unfortunately, the consequences

279. WHITE, THE JACKSONIANS, *supra* note 262, at 33 (emphasis added).

280. *See id.* at 33-34.

281. *Id.* at 300-324.

282. As Jackson noted in his First Annual Message, "I can not but believe that more is lost by the long continuance of men in office than is generally to be gained by their experience." He elaborated:

There, are, perhaps, few men who can for any great length of time enjoy office and power without being more or less under the influence of feelings unfavorable to the faithful discharge of their public duties. Their integrity may be proof against improper considerations immediately addressed to themselves, but they are apt to acquire a habit of looking with indifference upon the public interests and of tolerating conduct from which an unpracticed man would revolt. . . . Corruption in some and in others a perversion of correct feelings and principles divert government from its legitimate ends and make it an engine for the support of the few at the expense of the many. . . .

In a country where offices are created solely for the benefit of the people no one man has any more intrinsic right to official station than another. . . . No individual wrong is, therefore, done by removal, since neither appointment to nor continuance in office is matter of right. . . . It is the people, and they alone, who have a right to complain when a bad officer is substituted for a good one. He who is removed has the same means of obtaining a living that are enjoyed by the millions who never held office.

Andrew Jackson, First Annual Message (Dec. 8, 1829), in 3 MESSAGES & PAPERS, *supra* note 177, at 1005, 1011-12; *see also* 1 GOLDSMITH, *supra* note 125, at 175-77; VAN RIPER, *supra* note 77, at 31, 36-37.

283. *See* WHITE, THE JACKSONIANS, *supra* note 262, at 300-301.

of the Jacksonian system were less than benign,²⁸⁴ and the net result was to set in motion a train of events that would only end in the 1880s with the adoption of the civil service laws, which helped to restore some degree of quality control to the lower levels of the bureaucracy. (After a momentous fight, Presidential removal power was retained for policy-making positions when the second Tenure of Office Act was finally repealed in 1887.²⁸⁵)

Although Jackson firmly endorsed the principle of rotation in office, his actual exercise of the removal power was not quite as sweeping as his opponents sometimes seemed to think. Leonard White reports:

The shock was undoubtedly great, but the statistics show that the number of removals, although unprecedented, was small in terms of percentage. . . . [During the first eighteen months of Jackson's term, the] figures showed a total of 919 removals out of 10,093 officeholders or somewhat less than 10 per cent.²⁸⁶

White reports that another study suggests that during the rest of Jackson's Administration "less than 20% of all officeholders were removed, and . . . probably the figure was nearer 10 per cent,"²⁸⁷ and, if one looks at presidential offices only, 252 officers out of 612 were removed during Jackson's two terms.²⁸⁸ Thus, although Jackson clearly used the removal power much more broadly and for different reasons than had his predecessors, his use of that power was not quite so extraordinary as his political opponents claimed. Jackson removed more officers than all of his predecessors combined,²⁸⁹ but in percentage terms he made fewer removals than Jefferson.²⁹⁰

284. See *id.* at 325-46.

285. These developments are discussed in the second Article of our four part series, forthcoming from this law review.

286. WHITE, THE JACKSONIANS, *supra* note 262, at 307-08.

287. *Id.*

288. See *id.* at n.24 (citing FISH, *supra* note 77, at 125).

289. See FISH, *supra* note 77, at 74; FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 125, at 58; 2 HAYNES, *supra* note 155, at 793; GEORGE W. PEPPER, FAMILY QUARRELS: THE PRESIDENT, THE SENATE, THE HOUSE 110-11 (1931); Fisher, *Removal Power*, *supra* note 21, at 65.

290. See VAN RIPER, *supra* note 77, at 30, 34-36; see also Fisher, *Removal Power*, *supra* note 21, at 65 (citing Erik M. Eriksson, *The Federal Civil Service under President Jackson*, 13 MISS. VALLEY HIST. REV. 517 (1927)); FISHER, CONSTITUTIONAL CONFLICTS, *supra* note 125, at 58 (same); 1 GOLDSMITH, *supra* note 125, at 177; WHITE, THE JACK-

Jackson's most important and extraordinary removal came in 1833 with his firing of Treasury Secretary Duane during the Bank War. Even before that momentous event his removal policy had the political opposition up in arms.²⁹¹ In 1830 and 1833, a series of unsuccessful resolutions were put forward all of which were aimed at limiting the President's removal power.²⁹² Although these initial resolutions were rejected,²⁹³ in 1835 the Senate finally passed a resolution asking the President to communicate the charges that had led to the removal of Surveyor General Gideon Fitz, a com-

SONIANS, *supra* note 262, at 307-08.

291. See WHITE, THE JACKSONIANS, *supra* note 262, at 40.

292. In 1830, Senator Barton introduced resolutions calling upon the President to "inform the Senate of the cause or causes that existed for the removal[s]" of Theodore Hunt and William Clark. 6 CONG. DEB. 367 (1830) (Theodore Hunt); *id.* at 457-70 (William Clark); 8 Cong. Deb. 165-66 (1830); see also 2 HAYNES, *supra* note 155, at 793. Barton also introduced resolutions challenging the constitutionality of Jackson's removals. See S. DOC. NO. 103, 21st Cong., 1st Sess. (1830); see also DARRELL H. SMITH, THE UNITED STATES CIVIL SERVICE COMMISSION 3 (1928) [hereinafter SMITH, CIVIL SERVICE]. In support of these resolutions, Barton charged that Jackson's unfettered exercise of the removal power constituted "an absolute despotism and right of dark and ex parte inquisition" that was inconsistent with democratic government: "It fell upon my ear like the anathema of the minority pronounced from the modern Vatican! It sounded like the knell of our constitutional liberties!" 6 CONG. DEB. 459 (1830).

Shortly thereafter, Senator Holmes offered another series of resolutions criticizing Jackson's removal policies and requesting information on the reasons for all of his removals. See 6 CONG. DEB. 385 (1830); see also 2 HAYNES, *supra* note 155, at 794. Holmes admonished, "A President, with unlimited discretion in removals and appointments, . . . has only to will it, and he is the tyrant. It is done, it is finished, and the liberties of the people are gone forever." 6 CONG. DEB. 396 (1830).

Two years later, Senator Thomas Ewing introduced the most sweeping resolution of all:

That the practice of removing public officers by the President for any other purpose than that of securing a faithful execution of the laws, is hostile to the spirit of the Constitution, was never contemplated by its framers, is an extension of executive influence, is prejudicial to the public service and dangerous to the liberties of the people;

That it is inexpedient for the Senate to advise and consent to the appointment of any person to fill a supposed vacancy in any office, occasioned by the removal of a prior incumbent, unless such a prior incumbent shall appear to have been removed for a sufficient cause.

S. DOC. NO. 41, 22d Cong., 1st Sess. (1832); see also SMITH, CIVIL SERVICE, *supra*, at 3.

293. See 6 CONG. DEB. 374 (1830) (tabling Barton's resolution regarding Hunt); *id.* at 396 (voting to postpone the Holmes's resolutions by a vote of 24 to 21); 2 HAYNES, *supra* note 155, at 794 & n.2 (noting that Barton's resolution regarding Clark failed 22 to 26); SMITH, CIVIL SERVICE, *supra* note 292, at 3 (noting failure of Ewing resolutions).

munication the Senate claimed was needed for it to act on the nomination of his successor.²⁹⁴

Jackson bluntly refused to comply, charging that the resolution “either related to the subjects exclusively belonging to the executive department or otherwise encroached on the constitutional powers of the Executive.” Jackson reasoned, “The President in cases of this nature possesses the exclusive power of removal from office.” Senate interference in removals could not be tolerated, because “[s]uch a result, if acquiesced in, would ultimately subject the independent constitutional action of the Executive in a matter of great national concernment to the domination and control of the Senate.”²⁹⁵ Therefore, Jackson concluded:

[Although I have complied with previous requests] [i]t is now . . . my solemn conviction that I ought no longer . . . to yield to these unconstitutional demands. Their continued repetition imposes on me, as the representative and trustee of the American people, the painful but imperious duty of resisting to the utmost any further encroachment on the rights of the Executive.²⁹⁶

The Senate retaliated by rejecting Jackson’s choice to succeed Fitz, which had been pending for three months. Jackson tried to force the issue the following year by renominating the same person to the same post.²⁹⁷ The Senate again refused to confirm him by a vote of nearly two to one, but this did nothing to blunt the force with which Jackson defended his removal powers.

294. See Warren, *supra* note 21, at 11.

295. Andrew Jackson, Message to the Senate (Feb. 10, 1835), in 3 MESSAGES & PAPERS, *supra* note 177, at 1351, 1351-53.

296. *Id.* at 1352; see also 2 HAYNES, *supra* note 155, at 796-97; Warren, *supra* note 21, at 11; Younger, *supra* note 227, at 759-60. The following year, Treasury Secretary Levi Woodbury expressed a similar view in refusing a request by Senate Commerce Committee Chairman John Davis for information regarding the removal of David Melvill as weigher and gauger in the custom-house at Newport, Rhode Island. Woodbury stated:

Nor is it the practice of the Department, even under the injunction of secrecy in transacting Executive business as to appointments, where the Senate is, by law, a co-ordinate power, to forward communications on those subjects, unless they relate to nominations by the President, then under advisement before the Senate.

Letter from Levi Woodbury to John Davis (May 5, 1836), in S. DOC. NO. 430, 24th Cong., 1st Sess. 26, 30 (1836).

297. See 2 HAYNES, *supra* note 155, at 797.

The Jackson Administration also vigorously defended presidential powers to supervise exercise of law execution. While not completely consistent on the issue, Jackson's Attorneys General began challenging Wirt's conclusion that the President could not interfere with the decisions of accounting officers.²⁹⁸ Jackson's conduct

298. Jackson's first Attorney General, John MacPherson Berrien, concluded that a decision of the Second Comptroller of the Treasury "could only be set aside by the Secretary, acting by the direction of the President." Berrien even suggested that the Secretary of War could overturn a decision of the Second Comptroller even without explicit authorization from the President, reasoning that "the Secretary must possess this power, or Congress would have placed him at the head of the Department of War to be subjected to the control of a subordinate officer of the Treasury." 2 Op. Att'y Gen. 302, 303-04 (1829).

Jackson's second Attorney General, future Chief Justice Roger B. Taney, at first also strongly supported the President's power to direct all subordinate officers, including both district attorneys and accounting officers. As Taney concluded:

Upon the whole, I consider the district attorney as under the control and direction of the President . . . and that it is within the legitimate power of the President to direct him to institute or to discontinue a pending suit, and to point out to him, his duty, whenever the interest of the United States is directly or indirectly concerned.

* * * *

[Even if Congress were to delegate prosecutorial discretion to some other executive official,] it would not, and could not, deprive the President of the powers which belong to him under the constitution. The power conferred on the [subordinate executive official], by the law of Congress, would be merely in aid of the President, and to lighten the labors of his office. It could not restrain or limit his constitutional powers.

2 Op. Att'y Gen. 482, 489, 492 (1831). And if a district attorney refused to follow the President's directions, the President would be entitled to remove him. *Id.* at 489. Consistent with Berrien's opinion, Taney also concluded that a Secretary of War's confirmation of an accounting officer's decision was appealable to the President. Taney did conclude that once one Secretary had confirmed such a decision, that successor's Secretaries could not reopen that decision. That this bar to subsequent reconsideration by the Secretary in no way precluded subsequent presidential review is implicit in Taney's statement that "[t]he party may carry his appeal from the Secretary of War before the President." 2 Op. Att'y Gen. 463, 464 (1831).

A subsequent Taney opinion issued the following year wavered from this position somewhat. Taney still maintained that the President had "the legal power to order the dismissal of a suit instituted in the name of the United States" or to "compel the officer to prepare for trial and proceed to trial without delay." 2 Op. Att'y Gen. 507, 508, 510 (1832). However, the laws governing the settlement of accounts "seem to regard the decision of the Comptroller as final" and "appear . . . not to contemplate any appeal to the President." Therefore, Taney thought "that the decision of the Comptroller in this case is conclusive upon the executive branch of the government" and was not subject to subsequent presidential review. *Id.* at 509; *see also* 2 Op. Att'y Gen. 544 (1832). An opinion issued in between the two principle opinions clearly advised the President against overturning a decision of the accounting officers, but it is not clear whether Taney's advice was based on policy grounds or a belief that the President lacked the authority to inter-

makes it clear that he personally harbored no doubts about his power to control all parts of the executive branch. Jackson dominated his cabinet secretaries, treating them, as one historian has noted, "more like a General's orderlies than high civil officials."²⁹⁹ Like Jefferson, he took direct control over federal criminal prosecutions, ordering a district attorney to terminate condemnation proceedings then pending over jewels owned by the Princess of Orange.³⁰⁰ Moreover, when Attorney General Berrien resisted Jackson's early efforts to subdue the Bank of the United States, Jackson bluntly told Berrien, "[Y]ou must find a law authorizing the act or I will appoint an Attorney General who will," after which Berrien resigned and was replaced with Roger Taney.³⁰¹ But as we shall see, these initial assertions of presidential control of the executive branch, strong as they were, paled in comparison to Jackson's subsequent actions during his war with the Bank of the United States. Jackson's resounding victory in that struggle, a victory in which he was fully supported by a mobilized and en-

vene. 2 Op. Att'y Gen. 515 (1831).

Taney's successor (and one of the future House managers of Andrew Johnson's impeachment), Benjamin F. Butler, returned to the position espoused by Berrien, relying squarely on Berrien's opinion for the proposition that a Cabinet Secretary could either direct the Comptroller's resolution of any account that had not yet been finalized or revise the decision upon reviewing the Comptroller's report. See 2 Op. Att'y Gen. 652 (1834). And since the Secretaries were clearly subject to presidential direction, this logically implied that nothing prohibited the President from directing the actions of the accounting officers. In fact, Butler went so far as to suggest that, despite the statutory language indicating that the decisions of the accounting officers were to be conclusive, "the Comptroller, or the head of the department, may be authorized to interfere for the purpose of correcting errors of frauds which may have been discovered after the action of the Auditor." 2 Op. Att'y Gen. 625, 630 (1834). Thus, although Jackson's Attorneys General did waver on the issue, on balance they tended to support the President's power to direct all subordinates.

299. HINSDALE, *supra* note 156, at 313-14, *quoted in* Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 488.

300. See Cross, *Executive Orders 12,291 and 12,498*, *supra* note 3, at 488; Zamir, *supra* note 24, at 877; *see also* 2 Op. Att'y Gen. 482, 489 (1831). Like Washington, Jackson also asked Congress to concentrate all legal authority in a newly formed department. See Andrew Jackson, First Annual Message to Congress, in 3 MESSAGES & PAPERS, *supra* note 177, at 1005, 1016-17. Jackson only succeeded in effecting the creation of a Solicitor of the Treasury who was given the authority to control the United States Attorneys. See Act of May 29, 1830, ch. 153, sec. 5, 4 Stat. 414, 415; *see also* Bloch, *supra* note 16, at 618 n.184; Harvey, *supra* note 106, at 1578 & n.52. Jackson's direction of this prosecution clearly indicates that Jackson believed that his authority to control federal prosecutions did not depend on the creation of such a department.

301. Harvey, *supra* note 106, at 1679 (quoting ARTHUR S. MILLER, *The Attorney General as the President's Lawyer*, in ROLES OF THE ATTORNEY GENERAL 41, 51 (1968)) (quoting Senator George H. William's account of events)).

gaged public opinion, constitutes one of the truly great moments in the 208 year history of the unitary executive.

3. Jackson's Battle with the Bank and the Removal of Treasury Secretary Duane

The conflict between Andrew Jackson and Congress over the Second Bank of the United States began in 1832 when Jackson vetoed the bill to recharter the Bank,³⁰² and won reelection in a campaign in which the Bank had been a major issue.³⁰³ Jackson hated the Bank with an almost irrational vehemence, and he described it at times as a hydra-headed monster that impaired the morals of the American people, corrupted their leaders, and threatened their liberty.³⁰⁴ Jackson's disdain for the Bank was further enhanced by the active role the Bank played in opposing his reelection in 1832,³⁰⁵ and by the proud and difficult personality of the Bank's stubborn and vain president, Nicholas Biddle.³⁰⁶ After Biddle's foolish and unsuccessful involvement in several political disputes with Jackson,³⁰⁷ and particularly after his reckless opposition to Jackson in the 1832 election, the outraged and hot-tempered President resolved to destroy the Bank as soon as possible rather than waiting for its charter from the federal government to expire

302. In what is now widely perceived as a blunder, the Bank's President, Nicholas Biddle, pressed for its recharter four years before its initial charter was to expire. Jackson took the recharter proposal both as a challenge to his independence and as an indication of the Bank's intention to meddle in electoral politics. The Bank's political machinations only hardened Jackson's resolve to destroy it so as to end its involvement in politics. At the height of the Bank War, Jackson is said to have remarked to his Vice President, "The Bank, Mr. Van Buren, is trying to kill me, *but I will kill it.*" WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 252 (1992) (citing ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* 89 (1946)). See generally RICHARD B. LATNER, *THE PRESIDENCY OF ANDREW JACKSON* 165 (1979); REMINI, *BANK WAR*, *supra* note 266, at 75-80; ROBERT V. REMINI, *ANDREW JACKSON AND THE COURSE OF AMERICAN DEMOCRACY, 1833-1845*, at 143 (1984) [hereinafter REMINI, *COURSE OF DEMOCRACY*]; WALTER B. SMITH, *ECONOMIC ASPECTS OF THE SECOND BANK OF THE UNITED STATES* 149-154 (1953) [hereinafter SMITH, *ECONOMIC ASPECTS*].

303. See RALPH C.H. CATTERALL, *THE SECOND BANK OF THE UNITED STATES* 285 (1902); THOMAS P. GOVAN, *NICHOLAS BIDDLE* 242 (1959); LATNER, *supra* note 303, at 165; REMINI, *BANK WAR*, *supra* note 266, at 45-46, 99-100; SMITH, *ECONOMIC ASPECTS*, *supra* note 303, at 149, 156.

304. See REMINI, *BANK WAR*, *supra* note 266, at 15.

305. See *id.* at 98-99.

306. See *id.* at 32-35, 176.

307. See *id.* at 74-75.

in 1836.³⁰⁸ The mechanism that Jackson settled upon to accomplish this feat was to remove the federal money deposited in the Bank. After some investigation and study, Jackson and his close aide Amos Kendall resolved that the federal money would be placed instead in a consortium of politically friendly state banks, later known as “pet” banks, as had been done previously in 1819.³⁰⁹

The Bank’s charter authorized the Secretary of the Treasury to remove the federal deposits so long as the Secretary transmitted his reasons for doing so to Congress.³¹⁰ Because Jackson’s first Treasury Secretary, Louis McLane, had previously opposed removing the deposits, Jackson reshuffled his Cabinet, promoting McLane to Secretary of State and naming William J. Duane, who up to that point had been an ardent opponent of the Bank, as the new Treasury Secretary in June of 1833.³¹¹ However, when Jackson pressed Duane to remove the deposits, Duane was surprisingly reluctant to do so.³¹²

308. *See id.* at 109.

309. *See* LATNER, *supra* note 302, at 171; REMINI, *BANK WAR*, *supra* note 266, at 125; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 108-111. For a reprint of Treasury Secretary William Crawford’s 1820 report regarding the removal of the deposits, see 10 CONG. DEB. app. 131-46 (1834).

The President’s power to remove the deposits essentially vitiates the suggestion offered by Lessig and Sunstein that the Second Bank of the United States constituted “the first truly independent agency in the republic’s history.” Lessig & Sunstein, *supra* note 6, at 30; *see also* Froomkin, Note, *supra* note 6, at 808. Although only five of the Bank’s twenty-five directors were presidential appointees, the President always retained the power eliminate the Bank’s role in federal fiscal policy by ordering the removal of federal moneys from the Bank. Thus, as subsequent events would soon demonstrate, nothing about the Bank’s structure prevented the President from asserting complete control over the execution of federal policy. Once all federal funds were removed from the Bank, it became in essence a wholly private entity with no governmental role of any kind. At that point, it ceases to be relevant that only five of the twenty-five directors were presidential appointees.

310. *See* Act of Apr. 10, 1816, ch. 44, sec. 16, 3 Stat. 266, 274; *see also* Lessig & Sunstein, *supra* note 3, at 79 & n.312.

311. *See* REMINI, *BANK WAR*, *supra* note 266, at 115.

312. Unfortunately, Jackson and his friends mishandled Duane almost from the beginning. Shortly after Duane was appointed, lower-level Treasury officers and Kitchen Cabinet members Reuben M. Whitney and Amos Kendall both bluntly told Duane that he was expected to remove the deposits immediately. Being ordered around by his subordinates wounded Duane’s pride and, in Duane’s mind, reduced him “to a mere cypher [sic] in the administration.” William J. Duane, Address to the People of the United States (Dec. 2, 1833), *reprinted in* 10 CONG. DEB. app. 305 (1834). When Duane, confronted Jackson with their statements, Jackson assured Duane that he did not authorize Whitney and Kendall’s visit, but did admit that he wanted the deposits removed. Duane indicated his opposition to such action, but agreed to resign if unable to comply with Jackson’s wishes.

The conflict between Duane and Jackson came to a head during a series of Cabinet meetings held in September 1833. Jackson polled his Cabinet on the issue and discovered that support for removing the deposits was tepid at best.³¹³ Undeterred by his Cabinet's lack of enthusiasm, the very next day Jackson directed his Attorney General Roger B. Taney to read an "Exposé" that he had prepared for the President. It began with a strong exposition of the President's mandate to proceed against the Bank by virtue of his recent reelection, calling it "a decision of the people against the bank." Since Jackson "was sustained by a just people, . . . he desires to evince his gratitude by carrying into effect their decision so far as it depends upon him."³¹⁴ It then detailed several actions by the Bank as evidence of the Bank's corruption. First, the Exposé cited the Bank's failure to redeem the national debt in accordance with law.³¹⁵ Second, the Exposé described the Bank's

Duane's pride suffered another blow on the following month when Jackson ordered Duane to appoint Amos Kendall as an agent for recruiting state banks to serve as depositories for federal funds in place of the Bank. When Duane temporized, Jackson overruled Duane and instructed Kendall to draw up any orders he saw fit. Armed with his own instructions, Kendall quickly enlisted a group of state banks willing to risk the Bank's wrath and serve as depositories for the federal government. See CLAUDE G. BOWERS, *THE PARTY BATTLES OF THE JACKSON PERIOD* 295-96 (1965); CATTERALL, *supra* note 303, at 292-93; GOVAN, *supra* note 303, at 236-39; MARQUIS JAMES, *THE LIFE OF ANDREW JACKSON* 649 (1938); LATNER, *supra* note 302, at 174-75; REMINI, *BANK WAR*, *supra* note 266, at 114-17; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 65, 86, 94 n.47, 116-17.

313. See BOWERS, *supra* note 312, at 303; CATTERALL, *supra* note 303, at 295-96; LATNER, *supra* note 302, at 180; REMINI, *BANK WAR*, *supra* note 266, at 118; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 95-96.

314. Andrew Jackson, Removal of the Public Deposits (Sept. 18, 1833), in 3 *MESSAGES & PAPERS*, *supra* note 177, at 1224, 1226 [hereinafter Jackson, Exposé]. As Jackson further noted:

The object avowed by many of the advocates of the bank was [in asking for a recharter] to *put the President to the test*, that the country might know his final determination relative to the bank prior to the ensuing election. . . .

Can it now be said that the question of a recharter of the bank was not decided at the election which ensued? . . . On that ground the case was argued to the people; and now that the people have sustained the President, . . . it is too late . . . to say that the question has not been decided.

Id. at 1225-26 (emphasis in original); see also REMINI, *BANK WAR*, *supra* note 266, at 118-19; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 97.

315. See Jackson, Exposé, *supra* note 314, at 1229-30. In March of 1832, the government notified the Bank that it intended in July of that year to redeem half of the \$13 million in three-percent bonds it had issued, and it later informed the Bank that it intended to redeem the other half on January 1, 1833. However, when the scheduled redemption dates arrived, the Bank did not have the cash to redeem the bonds. Even the three-month

reprehensible conduct when the French government refused to honor a draft given to the United States under a treaty for reparations for the spoliation of American-owned property destroyed during the Napoleonic Wars.³¹⁶ Third, the Exposé pointed out that the Bank had refused to seat the government-appointed Bank directors on any committees and frequently had conducted business without them even though the board then lacked a working quorum.³¹⁷ Finally, the Exposé pointed out that the Bank had become improperly involved in politics, openly campaigning against Jackson in the previous presidential election.³¹⁸ Jackson clearly believed, and with some justification,³¹⁹ that the Bank was a renege institution and that it absolutely had to be stopped.³²⁰

The Cabinet reacted to the Exposé with a stunned silence. Several Cabinet members who had previously opposed removing the deposits worried that their positions had been compromised and offered their resignations. Reluctant to initiate a Cabinet shakeup, Jackson worked hard to persuade them to remain in office. He assumed full responsibility for removing the deposits, and he suc-

extension negotiated by Biddle for the first redemption was insufficient to allow the Bank to repay the debt. This enraged Jackson, whose conservative fiscal policy made him a strong advocate for repaying the debt. To make matters worse, the envoy Biddle sent to Europe to obtain relief from foreign holders of the bonds negotiated an agreement that violated the Bank charter's prohibition against purchasing the public debt.

Biddle cavalierly brushed off the resulting hubbub, stating that he did not see how the delay in redeeming of the bonds for a few months or the violation of the charter was material so long as the interest had stopped accruing and the federal government retained the use of its funds. The ensuing public outcry eventually forced Biddle to repudiate the agreement with the foreign debt holders, and the national debt was not retired until late 1833. See BOWERS, *supra* note 312, at 304; LATNER, *supra* note 302, at 165; REMINI, BANK WAR, *supra* note 266, at 119-21; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 97-98; SMITH, ECONOMIC ASPECTS, *supra* note 302, at 150, 156-58.

316. See Jackson, Exposé, *supra* note 314, at 1231-32. The draft was returned unpaid because the French Chamber of Deputies had failed to appropriate the funds for those reparations. When payment of the draft was refused by the French government, Biddle charged the federal government fifteen percent of the principal in interest, costs, reexchange, and damages. When the federal government refused to pay these charges, Biddle deducted it from the government's Bank dividends. See CATTERALL, *supra* note 303, at 299-300; GOVAN, *supra* note 303, at 233-34; REMINI, BANK WAR, *supra* note 266, at 119-20; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 98; SMITH, ECONOMIC ASPECTS, *supra* note 302, at 159-60.

317. See Jackson, Exposé, *supra* note 314, at 1232-33; see also LATNER, *supra* note 302, at 165.

318. See Jackson, Exposé, *supra* note 314, at 1233-35, 1237.

319. See REMINI, BANK WAR, *supra* note 266, at 176.

320. See GOVAN, *supra* note 303, at 248; JAMES, *supra* note 312, at 649; LATNER, *supra* note 302, at 181.

cessfully entreated his Cabinet Secretaries to stay in office.³²¹ Treasury Secretary Duane asked Jackson if he was being directed by the President to remove the deposits, and Jackson answered affirmatively.³²² The next day, Jackson sent a message asking Duane if he had made his decision. When Duane asked for a delay until September 21, Jackson informed Duane that the removal of the deposits would be announced by the newspapers on September 20 with or without Duane's consent.³²³

When the announcement appeared in the *Washington Globe* as indicated,³²⁴ Duane obstinately dug in his heels, asking that the removal be delayed ten weeks until Congress was back in session. Jackson remained adamant, insisting, "Not a day, not an hour."³²⁵ Duane persisted, sending Jackson a puerile series of letters attempting to justify his actions and rescinding his previous promise to resign.³²⁶ Not wanting to argue further with Duane, Jackson returned Duane's letter describing it "as a communication which I cannot receive," and this time he requested that Duane adhere to his previous promise to resign.³²⁷ After Duane continued to refuse to remove the deposits, Jackson sent Duane a curt letter on September 23 dismissing him as Secretary of the Treasury.³²⁸ Shortly

321. See LATNER, *supra* note 302, at 182; REMINI, *BANK WAR*, *supra* note 266, at 124-25; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 99, 103-04.

322. See REMINI, *BANK WAR*, *supra* note 266, at 122; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 99.

323. See BOWERS, *supra* note 312, at 306; GOVAN, *supra* note 303, at 243; REMINI, *BANK WAR*, *supra* note 266, at 122; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 99-100.

324. See WASH. GLOBE, Sept. 20, 1833, *reprinted in* 10 CONG. DEB. app. 306 (1834); see also BOWERS, *supra* note 312, at 306; REMINI, *BANK WAR*, *supra* note 266, at 122.

325. REMINI, *BANK WAR*, *supra* note 266, at 124; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 101.

326. See Letter from the Secretary of the Treasury to the President of the United States (No. 2, Sept. 21, 1833), *in* 10 CONG. DEB. app. 306, 306-07 (1834); Letter from the Secretary of the Treasury to the President of the United States (No. 4, Sept. 21, 1833), *in* 10 CONG. DEB. app. 307, 308 (1834); Letter from the Secretary of the Treasury to the President of the United States (No. 5, Sept. 21, 1833), *in* 10 CONG. DEB. app. 308, 308 (1834); Letter from the Secretary of the Treasury to the President of the United States (No. 6, Sept. 21, 1833), *in* 10 CONG. DEB. app. 308, 309 (1834); see also BOWERS, *supra* note 312, at 307-08; CATTERALL, *supra* note 303, at 293-94; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 100-01.

327. Letter from the President of the United States to the Secretary of the Treasury (No. 3, Sept. 21, 1833), *in* 10 CONG. DEB. app. 307, 307 (1834) (returning Duane's first letter). Jackson later returned Duane's subsequent letters as "inadmissible" along with his letter removing Duane. See Letter from the President of the United States to the Secretary of the Treasury (No. 7, Sept. 23, 1833), *in* 10 CONG. DEB. app. 309, 309 (1834) [hereinafter, Jackson, Duane Removal Letter].

328. Jackson's letter read as follows:

after Jackson appointed Taney as Duane's successor, Taney announced the removal of the deposits.³²⁹

Taney's actions triggered a battle between Congress and the President of a magnitude the country had never before witnessed. The conflict led to the creation of the Whig Party during the winter of 1833-34, and it was in the Whig-controlled Senate that the conflict was sharpest as some of the greatest orators in the history of Congress spoke out against the actions of "King Andrew I."³³⁰ The opposition was led by the famous triumvirate of Daniel Webster, John C. Calhoun, and Henry Clay. It fell to Clay, a long-time Bank supporter, defeated by Jackson in the election of 1832, to call for an immediate investigation into the removal of the deposits that would be conducted by the entire Senate rather than by a committee. As a part of this investigation, on December 10, 1833, Clay introduced a resolution requesting that Jackson lay a copy of the Exposé before the Senate in order to ensure that the newspa-

[F]rom all your recent communications, as well as your recent conduct, your feelings and sentiments appear to be of such a character that, after your letter of July last, in which you say, should your views not accord with mine "I will from respect to you and for myself, afford you an opportunity to select a successor whose views may accord with your own on the important matter in contemplation," and your determination now to disregard the pledge you then gave, I feel myself constrained to notify you that your further services as Secretary of the Treasury are no longer required.

Jackson, Duane Removal Letter, *supra* note 327, at 309; *see also* LATNER, *supra* note 302, at 181; REMINI, BANK WAR, *supra* note 266, at 124; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 102.

329. *See* Letter from the Secretary of the Treasury Transmitting a Report upon the Subject of the Removal of the Public Deposits from the Bank of the United States (Dec. 3, 1833), in 10 CONG. DEB. app. 59 (1834). Interestingly, Taney accepted the Treasury portfolio even though he owned stock in one of the state banks recruited to hold the federal funds in place of the Bank of the United States. This, of course, placed Taney in a direct conflict of interest. Taney's position worsened further when that state bank's financial troubles led it to balance its own accounts by improperly drawing on funds that the federal government had given to it to protect against any future retaliation by the Bank of the United States. *See* CATTERALL, *supra* note 303, at 303; GOVAN, *supra* note 303, at 245; JAMES, *supra* note 312, at 651; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 105-06.

330. Claude Bowers aptly entitles his chapter discussing this debate as "The Battle of the Gods." BOWERS, *supra* note 312, at 322. Thomas A.R. Nelson similarly observed in his closing argument during the impeachment trial of Andrew Johnson, "There were giants in those days." 2 THE TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 161 (Washington, Gov't Printing Off. 1868) [hereinafter TRIAL OF ANDREW JOHNSON]; *see also* REMINI, BANK WAR, *supra* note 266, at 130; GLYNDON G. VAN DEUSEN, THE LIFE OF HENRY CLAY 278 (1937).

pers had reported it accurately. This resolution carried by a vote of twenty-three to eighteen.³³¹ Even though the *Exposé* had been widely published and was eventually even reprinted in the *Register of Debates*,³³² Jackson refused to comply, exclaiming:

The executive is a coordinate and independent branch of the Government equally with the Senate, and I have yet to learn under what constitutional authority that branch of the Legislature has a right to require of me an account of any communication . . . made to the heads of Departments acting as a Cabinet council.³³³

Clay retaliated on December 26 by introducing a series of four resolutions to censure Jackson. The first three resolutions addressed whether the circumstances justified the removal of the deposits. The fourth resolution condemned Duane's removal:

[B]y dismissing the late Secretary of the Treasury because he would not, contrary to his sense of his own duty, remove the money of the United States in deposit [sic] with the Bank of the United States and its branches, in conformity with the President's opinion; and by appointing his successor to effect such removal, which has been done, the President has assumed the exercise of a power over the treasury of the United States, not granted to him by the constitution and laws, and dangerous to the liberties of the people.³³⁴

331. See 10 CONG. DEB. 23-37 (1833).

332. See 10 CONG. DEB. app. 284 (1834).

333. Andrew Jackson, Message to the Senate (Dec. 12, 1833), in 3 MESSAGES & PAPERS, *supra* note 177, at 1255, 1255; see also BOWERS, *supra* note 312, at 323; JAMES, *supra* note 312, at 655-56; REMINI, BANK WAR, *supra* note 266, at 137; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 123; Younger, *supra* note 227, at 759.

334. 10 CONG. DEB. 58 (1833). The resolution was subsequently amended so that the final version read: "That the President, in the late executive proceedings in relation to the public revenue, has assumed upon himself authority not conferred by the constitution and laws, but in derogation of both." *Id.* at 1187 (1834); see also REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 124-25. For the various versions of the resolutions, see Senator Benton's statements at 10 CONG. DEB. 637-38, 1699 (1834).

In debating these resolutions, Clay charged, "We are . . . in the midst of a revolution, hitherto bloodless, but rapidly tending towards a total change of the pure republican character of the Government, and to the concentration of all power in the hands of one man." 10 CONG. DEB. 59 (1833).

Despite the best efforts of Jackson's supporters, these resolutions passed the Senate on March 29, 1834, by a vote of twenty-six to twenty.³³⁵

Passage of this censure resolution enraged Jackson. In response, he submitted a "Protest" in which he condemned the Senate's actions.³³⁶ Since Jackson had been compelled to swear an oath to "preserve, protect, and defend the Constitution," it was his "imperative duty to maintain the supremacy of that sacred instrument and the immunities of the department intrusted to my care by all means consistent with my own lawful powers, with the rights of others, and with the genius of our civil institutions." Therefore, because the censure resolution was "not only unauthorized by the Constitution, but in many respects repugnant to its provisions and subversive of the rights secured by it to other coordinate departments," Jackson concluded that he had no choice but to offer his "*solemn*

335. See 10 CONG. DEB. 1187 (1834); see also BOWERS, *supra* note 312, at 330, 337; CATTERALL, *supra* note 303, at 346; GOVAN, *supra* note 303, at 266; JAMES, *supra* note 312, at 674; REMINI, BANK WAR, *supra* note 266, at 137-41; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 149-52; VAN DEUSEN, *supra* note 330, at 284.

Clay also took other actions to oppose Jackson. He considered fomenting impeachment proceedings against Jackson based on Jackson's removals and vetoes, but was dissuaded by his colleagues. VAN DEUSEN, *supra* note 330, at 297. Clay later submitted additional anti-Jackson resolutions providing:

1. *Resolved*, That the constitution of the United States does not vest in the President power to remove at his pleasure officers under the Government of the United States, whose offices have been established by law.

2. *Resolved*, That, in all cases of offices created by law, the tenure of holding which is not prescribed by the constitution, Congress is authorized by the constitution to prescribe the tenure, terms, and conditions on which they are to be holden.

3. *Resolved*, That the Committee on the Judiciary be instructed to inquire into the expediency of providing by law that in all instances of appointment to office by the President, by and with the advice and consent of the Senate, other than diplomatic appointments, the power of removal shall be exercised only in concurrence with the Senate, and, when the Senate is not in session, that the President may suspend any such officer, communicating his reasons for the suspension to the Senate at its first succeeding session; and, if the Senate concur with him, the officer shall be removed, but if it do not concur with him, the officer shall be restored to office.

10 CONG. DEB. 834-36 (1834). These resolutions were made the order of the day on April 7, 1834, but were never debated in the Senate. See *id.* at 1260; see also VAN DEUSEN, *supra* note 330, at 297-98.

336. Andrew Jackson, Protest (Apr. 15, 1834), 3 MESSAGES & PAPERS, *supra* note 177, at 1288 [hereinafter Jackson, Protest]; see also BOWERS, *supra* note 312, at 330, 339; GOVAN, *supra* note 303, at 266; JAMES, *supra* note 312, at 674; REMINI, BANK WAR, *supra* note 266, at 142-43; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 152-53.

protest" to the censure resolution as an unconstitutional action on the part of the Senate.³³⁷

Jackson began his Protest by decrying the Senate's use of resolutions as a means of declaring presidential actions unconstitutional. Aside from a few, explicit deviations clearly mandated by the Constitution, the Vesting Clauses had established a formal separation of powers. As Jackson noted:

The legislative power is, subject to the qualified negative of the President, vested in the Congress of the United States . . . ; the executive power is vested exclusively in the President, except that in the conclusion of treaties and in certain appointments to office he is to act with the advice and consent of the Senate; the judicial power is vested exclusively in the Supreme and other courts of the United States, except in cases of impeachment.³³⁸

The tripartite structure created by these Vesting Clauses should be strictly followed unless contradicted by an express constitutional provision. Admittedly, for the enumerated "special purposes," such

337. Jackson, Protest, *supra* note 336 at 1289 (emphasis in original). Jackson's Protest also included a sweeping claim of executive power over the public treasury. According to the Protest, "The custody of the public property, under such regulations as may be prescribed by legislative authority, has always been considered an appropriate function of the executive department." Since "[p]ublic money is but a species of public property," the Protest concluded that "its custody always has been and always must be . . . intrusted to the executive department." *Id.* at 1301. Jackson later recanted this position in his so-called Codicil to his Protest, in which he averred that "it was not my intention to deny in the [previous] message the power and right of the legislative department to provide by law for the custody, safe-keeping, and disposition of the public money and property of the United States." Andrew Jackson, Message to the Senate (Apr. 21, 1834), in 3 MESSAGES & PAPERS, *supra* note 177, at 1312, 1312. The Codicil further conceded:

I admit without reserve, as I have before done, the constitutional power of the Legislature to prescribe by law the place or places in which the public money or other property is to be deposited, and to make such regulations concerning its custody, removal, or disposition as they may think proper to enact. Nor do I claim for the Executive any right to the possession or disposition of the public property or treasure or any authority to interfere with the same, except when such possession, disposition or authority is given to him by law. Nor do I claim the right in any manner to supervise or interfere with the person intrusted with such property or treasure, unless he be an officer whose appointment under the Constitution and laws, is devolved upon the President alone or in conjunction with the Senate, and for whose conduct he is constitutionally responsible.

Id. at 1313.

338. Jackson, Protest, *supra* note 336, at 1290.

as the President's veto power over legislation, Congress's impeachment power, and the Senate's participation in treaties and appointments, "there is an occasional intermixture of the powers of the different departments, yet with these exceptions each of the three great departments is independent of the others in its sphere of action."³³⁹ These limited departures, however, constituted the only ways in which the Constitution authorized a particular branch to interfere in the affairs of any other branch:

In every other respect each of them is the coequal of the other two, and all are the servants of the American people, without power or right to control or censure each other in the service of their common superior, save only in the manner and to the degree which that superior has prescribed.³⁴⁰

"Tested by these principles," Jackson concluded, "the resolution of the Senate is wholly unauthorized by the Constitution, and in derogation of its entire spirit." Although "[t]he high functions assigned by the Constitution to the Senate are in their nature either legislative, executive, or judicial," the censure resolution did not represent a proper exercise of any of those functions. In passing the censure resolution, the Senate could not have been acting in its legislative capacity, since the resolution "asserts no legislative power, proposes no legislative action, and neither possesses the form nor any of the attributes of a legislative measure." Moreover, Jackson noted that the Senate's executive powers "relate exclusively to the consideration of treaties and nominations to office, and they are exercised in secret session and with closed doors." Since "[t]his resolution does not apply to any treaty or nomination, and was passed in a public session," Jackson thought it "manifest that the resolution was not justified by any of the executive powers conferred on the Senate." And although "the whole phraseology and sense of the resolution seem to be judicial," the only judicial power possessed by the Senate was the power to try impeachments.³⁴¹ The Senate, however, could not have passed the resolution pursuant to its judicial power to try impeachments, since "[t]he Constitution makes the House of Representatives the exclusive judges, in the first instance, of the question whether the President

339. *Id.*

340. *Id.*

341. *Id.* at 1291-92.

has committed an impeachable offense,” and the House had instituted no such proceedings.³⁴² Therefore, Jackson concluded that the Constitution did not authorize the Senate to “take up, consider, and decide upon the official acts of the Executive” simply “for the purposes of a public censure, and without any view to legislation or impeachment.”³⁴³

Jackson did not simply denounce the form of the Senate’s action. He attacked its substance as well. In one of the most powerful statements ever offered in favor of the theory of the unitary executive, Jackson declared that there was nothing improper in removing Duane for his failure to follow the President’s wishes. Because the Executive Power and the Take Care Clauses made him “responsible for the entire action of the executive department, it was but reasonable that the power of appointing, overseeing, and controlling those who execute the laws—a power in its nature executive—should remain in his hands.”³⁴⁴ Jackson elaborated:

The whole executive power being vested in the President, who is responsible for its exercise, it is a necessary consequence that he should have a right to employ agents of his own choice to aid him in the performance of his duties, and to discharge them when he is no longer willing to be responsible for their acts. In strict accordance with this principle, the power of removal, which, like that of appointment, is an . . . executive power, is left unchecked by the Constitution in relation to all executive officers.³⁴⁵

342. *Id.* at 1295; see also *id.* at 1292 (“[U]nder the provisions of the Constitution it would seem to be equally plain that neither the President nor any other officer can be rightfully subjected to the operation of the judicial power of the Senate except in the cases and under the forms prescribed by the Constitution.”). Jackson also complained that the resolution could not represent a proper impeachment because it did not specify which laws or parts of the Constitution had been violated. *Id.* at 1296-98.

Interestingly, Jackson also challenged the censure resolution as an improper infringement upon the prerogatives of the House of Representatives as well as upon the President’s:

The Constitution makes the House of Representatives the exclusive judges, in the first instance, of the question whether the President has committed an impeachable offense. A majority of the Senate, whose interference with this preliminary question has for the best of all reasons been studiously excluded, anticipate the action of the House of Representatives, assume . . . the function which belongs exclusively to that body.

Id. at 1295.

343. Jackson, Protest, *supra* note 336, at 1291.

344. *Id.* at 1298.

345. *Id.* at 1298-99. As Jackson further noted in his private memorandum book, only

And even “if there were any just ground for doubt on the face of the Constitution whether all executive officers are removable at the will of the President, it is obviated by the cotemporaneous [sic] construction of the instrument and the uniform practice under it.”³⁴⁶ As Jackson noted:

The power of removal was a topic of solemn debate in the Congress of 1789 while organizing the administrative departments of the Government, and it was finally decided that the President derived from the Constitution the power of removal so far as it regard that department for whose acts he is responsible.³⁴⁷

through the exercise of the appointment and removal powers can the President ensure “that the laws are faithfully executed and those measures adopted which are best calculated to promote the public interest.” REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 102.

Jackson also contrasted the treatment of the removal power under the Constitution with the regime established by the Articles of the Confederation. Jackson noted that “[i]n the Government from which many of the fundamental principles of our system are derived the head of the executive department originally had power to appoint and remove at will all officers,” including judges and that “[i]t was to take the judges out of this general power of removal, and thus make them independent of the Executive, that the tenure of their offices was changed to good behavior.” Jackson, *Protest*, *supra* note 336, at 1299. The fact that no similar provision limited the President’s power to remove executive officers logically implied that the Constitution granted to the President the full removal power over executive officers wielded by the executive under the Articles of the Confederation. *See id.*

346. *Id.* at 1299.

347. *Id.* Although this debate at first focused on the State Department, its principles were subsequently extended to the Treasury Department as well, and “it appears never to have occurred to anyone in the Congress of 1789, or since until very recently that [the Secretary of the Treasury] was other than an executive officer, the mere instrument of the Chief Magistrate in the execution of the laws, subject, like all other heads of Departments, to his supervision and control.” *Id.* at 1299-1300. Furthermore, Jackson noted:

[A]t the time of the organization of the Treasury Department an incident occurred which distinctly evinces the unanimous concurrence of the First Congress in the principle that the Treasury Department is wholly executive in its character and responsibilities. A motion was made to strike out the provision of the bill making it the duty of the Secretary “to digest and report plans for the improvement and management of the revenue and for the support of public credit,” on the ground that it would give the executive department of the Government too much influence and power in Congress. The motion was not opposed on the ground that the Secretary was the officer of Congress and responsible to that body, . . . but on other ground, which conceded his executive character throughout. The whole discussion evinces an unanimous concurrence in the principle that the Secretary of the Treasury is wholly an executive officer. . . .

As Jackson concluded:

Thus was it settled by the Constitution . . . that the entire executive power is vested in the President of the United States; that as incident to that power the right of appointing and removing those officers who are to aid him in the execution of the laws, with such restrictions only as the Constitution prescribes, is vested in the President; *that the Secretary of the Treasury is one of those officers . . .*; that in the performance of these duties [the Secretary of the Treasury] is subject to the supervision and control of the President, and in all important measures having relation to them consults the Chief Magistrate and obtains his approval and sanction.³⁴⁸

Permitting the Senate “to interfere with this exercise of Executive power,” Jackson warned, would inevitably lead to the complete destruction of executive independence:

Id. at 1300-01.

348. Jackson, *Protest*, *supra* note 336, at 1304 (emphasis added). Similar statements appear throughout the *Protest*:

Here, then, we have the concurrent authority of President Washington, of the Senate, and the House of Representatives, numbers of whom had taken an active part in the convention which framed the Constitution and in the State conventions which adopted it, that the President derived an unqualified power of removal from that instrument itself, which is “beyond the reach of legislative authority.” Upon this principle the Government has now been steadily administered for about forty-five years, during which there have been numerous removals made by the President or by his direction, embracing every grade of executive officers from the heads of Departments to the messengers of bureaus.

Id. at 1299-1300. Jackson later stated:

Nearly forty-five years had the President exercised, without a question as to his rightful authority, those powers for the recent assumption of which he is now denounced. . . . [A]nd yet in no one instance is it known that any man, whether patriot or partisan, had raised his voice against it as a violation of the Constitution.

Id. at 1305. Still later, a sarcastic Jackson jibed:

[O]n this occasion it is discovered for the first time that those who framed the Constitution misunderstood it; that the First Congress and all its successors have been under a delusion; that the practice of near forty-five years is but a continued usurpation; that the Secretary of the Treasury is not responsible to the President, and that to remove him is a violation of the Constitution and laws for which the President deserves to stand forever dishonored on the journals of the Senate.

Id. at 1306.

If the principle be once admitted, it is not difficult to perceive where it may end. If by a mere denunciation like this resolution the President should ever be induced to act in a matter of official duty contrary to the honest convictions of his own mind in compliance with the wishes of the Senate, the constitutional independence of the executive department would be as effectually destroyed and its power as effectually transferred to the Senate as if that end had been accomplished by an amendment of the Constitution. . . . It has already been maintained . . . that the Secretary of the Treasury is the officer of Congress and independent of the President. . . . Followed to its consequences, this principle will be found effectually to destroy one coordinate department of the Government to concentrate in the hands of the Senate the whole executive power, and to leave the President as powerless as he would be useless—the shadow of authority after the substance had departed.³⁴⁹

In short, if “the practice by the Senate of the unconstitutional power of arraigning and censuring the official conduct of the Executive” were permitted to continue, it would “break down the checks and balance by which the wisdom of its framers sought to insure its stability and usefulness”³⁵⁰

And perhaps most importantly for the future contours of presidential power, Jackson invoked the President’s unique role as the only “direct representative of the American people” as supporting his authority to control of the entire affairs of the executive branch.³⁵¹ Jackson maintained that “[i]f the Secretary of the Treasury be independent of the President in the execution of the laws, then is there no direct responsibility to the people in that important branch of this Government to which is committed the care of the national finances.” Permitting the Secretary of the Treasury to decide for himself all issues pertaining to the Bank of the United States would effectively allow the Bank “to control . . . the whole action of the Government . . . in defiance of the Chief Magistrate

349. *Id.* at 1305.

350. *Id.* at 1309.

351. *Id.*; see also *id.* at 1290 (noting that the President was properly held accountable by “the bar of public opinion” as well as by the Constitution “for every act of his Administration”); Jackson, *Exposé*, *supra* note 314, at 1237 (maintaining that his opposition to the Bank had been authorized by “the suffrages of the American people”).

elected by the people and responsible to them” so long as “a Secretary shall be found to accord with them in opinion or can be induced in practice to promote their views.”³⁵² Jackson also admonished that permitting the Senate to sanction the President for purely executive acts threatened to undermine “the confidence of the people in [the President’s] ability and virtue . . . , and the real power of the Government will fall into the hands of a body holding their offices for long terms, not elected by the people and not to them directly responsible.”³⁵³ Moreover, Jackson cautioned that congressional interference in executive affairs exacerbated the problems of faction and regionalism:

[A]ll the independent departments of the Government, and the States which compose our confederated Union, instead of attending to their appropriate duties and leaving those who may offend to be reclaimed or punished in the manner pointed out in the Constitution, would fall to mutual crimination and recrimination and give to the people confusion and anarchy instead of order and law, until at length some form of aristocratic power would be established on the ruins of the Constitution or the States be broken into separate communities.³⁵⁴

Therefore, Jackson regarded it as his solemn duty to oppose any effort so “calculated . . . to concentrate in the hands of a body not directly amenable to the people a degree of influence and power dangerous to their liberties and fatal to the Constitution of the choice.”³⁵⁵ Only by permitting the President to assume responsibility for the entire executive branch, including the Treasury Department, through the unrestricted exercise of the removal power could the normative benefits of energy, accountability, and faction control envisioned by the Framers of the Constitution be guaranteed.

Upon the reading of the Protest in the Senate, George Poindexter immediately denounced it, declaring, as Remini describes, that “it could not be considered an executive message” in that it proposed no legislation and “did not pertain to any of the public occasions in which the President is . . . authorized to ad-

352. Jackson, *Protest*, *supra* note 336, at 1309.

353. *Id.* at 1310.

354. *Id.*

355. *Id.* at 1311.

dress himself to the Senate.”³⁵⁶ Poindexter charged that it was an “unofficial paper” signed by one “Andrew Jackson” which should “not be received.”³⁵⁷ Clay seconded Poindexter, objecting specifically to Jackson’s claim as the representative of the people:

The President speaks of a responsibility to himself. . . . Thus, every thing concentrates in the President. He is the sole Executive; all other officers are his agents, and their duties are his duties. This is altogether a military idea, wholly incompatible with free government. I deny it absolutely. There exists no such responsibility to the President. All are responsible to the law, and to the law only, or not responsible at all.³⁵⁸

Clay was backed up by the immense oratorical skills of John C. Calhoun, who was still embittered about being passed over as Jackson’s heir apparent,³⁵⁹ and who called the protest a “tyrant’s plea.”³⁶⁰ Calhoun thundered:

Infatuated man! blinded by ambition—intoxicated by flattery and vanity! Who, that is the least acquainted with the human heart—who, that is conversant with the page of history, does not see, under all this, the workings of a dark, lawless, and insatiable ambition; which, if not arrested, will finally impel him to his own, or his country’s ruin?³⁶¹

Daniel Webster, after also flirting with the Democratic Party,³⁶²

356. REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 155.

357. *Id.*

358. 10 CONG. DEB. 1575 (1834).

359. Calhoun’s bitterness over his falling out with Jackson is perhaps best illustrated by his role in blocking Martin Van Buren’s nomination as Minister to England. Not only did Calhoun orchestrate the defeat of Van Buren’s confirmation; he even arranged that the vote would end in a tie, so that he himself, as Jackson’s first Vice President, could cast the vote against Van Buren’s nomination. Calhoun’s joy over the outcome was short-lived, as Van Buren’s defeat galvanized his support for the Vice Presidential nomination. Thus, soon after Van Buren was forced to return ignominiously from England, he was tapped as Calhoun’s replacement as the person whom Jackson would support to be his successor. See BOWERS, *supra* note 312, at 178-82; HARRIS, *ADVICE AND CONSENT*, *supra* note 219, at 55; 2 HAYNES, *supra* note 155, at 768; VAN RIPER, *supra* note 77, at 38; WHITE, *THE JACKSONIANS*, *supra* note 262, at 108-09.

360. 10 CONG. DEB. 1645 (1834).

361. *Id.*

362. See GOVAN, *supra* note 303, at 261-62; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 110, 128.

returned to the Whig fold and offered a scathing denunciation of the Protest: "Again and again we hear it said that the President is responsible to the American people! that he is responsible to the bar of public opinion! For whatever he does, he assumes accountability to the American people! . . . And this is thought enough for a limited, restrained, republican government!"³⁶³ To Webster, the doctrines of Jackson's protest were tantamount to dictatorial rule: "[I]f he may be allowed to consider himself as the sole representative of all the American people . . . then I say . . . that the Government (I will not say the people) has already a master."³⁶⁴

The Senate voted twenty-seven to sixteen not to receive the Protest on May 8, 1834,³⁶⁵ and Senator Benton's motion to expunge the Senate's refusal to receive the Protest from its Journal failed on the last day of the session.³⁶⁶ The Senate also refused to confirm four of Jackson's five nominees for Bank directorships.³⁶⁷ Jackson resolutely resubmitted their nominations along with a message defending their candidacies.³⁶⁸ A Senate report acknowledged "that a right of renomination exists," but opposed the practice except for "in very clear and strong cases."³⁶⁹ The Senate proceeded to reject the nominations by even wider margins than before.³⁷⁰ As a final gesture of defiance, the Senate summarily re-

363. 10 CONG. DEB. 1687 (1834).

364. *Id.* at 1688. Webster may have been less than statesman-like in his advocacy for the Bank, since like Taney, he was embroiled in a conflict of interest. In the midst of this conflict over the Bank, Webster wrote to Biddle complaining that his annual "retainer" had not been "renewed or refreshed as usual." Webster warned ominously, "If it be wished that my relations to the Bank should be continued, it may be well to send me the usual retainers." BOWERS, *supra* note 312, at 324; JAMES, *supra* note 312, at 657-58; REMINI, *COURSE OF DEMOCRACY*, *supra* note 313, at 128; VAN DEUSEN, *supra* note 330, at 278.

365. *See* 10 CONG. DEB. 1711-12 (1834); *see also* VAN DEUSEN, *supra* note 330, at 284.

366. The Senate tabled Benton's motion by a vote of 29 to 27. *See* 11 CONG. DEB. 727-28 (1835); *see also* REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 177; VAN DEUSEN, *supra* note 330, at 284.

367. *See* 10 CONG. DEB. app. 310-11 (1834) (rejecting the nominations of Peter Wager by a vote of 20 to 25, Henry D. Gilpin by a vote of 20 to 24, John T. Sullivan by a vote of 18 to 27, and Hugh McElderry by a vote of 20 to 25).

368. *See* Andrew Jackson, Message to the Senate (Mar. 11, 1834), in 3 MESSAGES & PAPERS, *supra* note 177, at 1260; *see also* BOWERS, *supra* note 312, at 324; CATTERALL, *supra* note 303, at 308-09; HARRIS, *ADVICE AND CONSENT*, *supra* note 219, at 57-59; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 175; SMITH, *ECONOMIC ASPECTS*, *supra* note 302, at 167-68.

369. S. DOC. NO. 333, 23d Cong., 1st Sess. 11-14 (1834), *reprinted in* 10 CONG. DEB. app. 314, 315 (1834).

370. *See* 10 CONG. DEB. app. 316 (1834) (rejecting the renominations by a vote of 30

jected Taney's nomination as Secretary of the Treasury.³⁷¹

The debate would have been less rancorous in the Democratically-controlled House of Representatives but for a procedural blunder by one of Jackson's closest friends and allies, James K. Polk. Jackson had hoped that Taney's report would be referred to the Committee on Ways and Means, which Polk chaired. However, Polk failed to object when another Member of Congress, at Clay's behest, moved that Taney's report be considered by the Committee of the Whole, which opened the issue to unlimited debate on the House floor. When Polk tried to undo the damage by passing the previous question and reconsidering its decision, the motion failed by three votes.³⁷² Consequently, Jackson's removal of Duane was subjected to a lengthy debate in the House of Representatives as well.³⁷³

Throughout this tumult, Jackson only became more resolute.³⁷⁴ He was aided greatly by Nicholas Biddle's foolish decision to trigger a financial panic during the winter of 1833-34.³⁷⁵ Biddle believed that the panic would scare the public into supporting recharter of the Bank, but its effect was in the opposite direction. Ultimately, it angered the public and gave Jackson and the Democrats a new complaint that could be used against the Bank. Jackson responded with great skill and made several deft political moves to deflect pressure from himself onto the Bank. First, he infused the debate with moral overtones, portraying the conflict as pitting honest working people against the moneyed aristocracy. Second, he deflected all criticism away from himself and towards the Bank,

to 11); see also HARRIS, *ADVICE AND CONSENT*, *supra* note 219, at 259; 2 HAYNES, *supra* note 155, at 771; SMITH, *ECONOMIC ASPECTS*, *supra* note 302, at 167-68; WHITE, *THE JACKSONIANS*, *supra* note 262, at 109. Jackson subsequently stood by his defeated nominees, designating them for other positions with mixed success. See *id.* James A. Bayard, the one nominee who was confirmed by the Senate, declined to serve. See 2 HAYNES, *supra* note 155, at 771; SMITH, *ECONOMIC ASPECTS*, *supra* note 302, at 167-68.

371. See 2 GOLDSMITH, *supra* note 125, at 978; REHNQUIST, *supra* note 302, at 255; REMINI, *BANK WAR*, *supra* note 266, at 142; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 170-72; VAN DEUSEN, *supra* note 330, at 279; WHITE, *THE JACKSONIANS*, *supra* note 262, at 108-10.

372. See REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 123-24.

373. One House member even considered initiating impeachment proceedings. See *id.* at 150.

374. Benton observed of Jackson, "I . . . never saw him appear more truly heroic and grand than at this time. He was perfectly mild in his language, cheerful in his temper, firm in his conviction." See *id.* (quoting 1 THOMAS H. BENTON, *THIRTY YEARS VIEW* 424 (1865)).

375. See REMINI, *BANK WAR*, *supra* note 266, at 127-28.

responding to all those asking for relief from the monetary contraction, "What do you come to me for? . . . Go to Nicholas Biddle. We have no money here, gentlemen. Biddle has all the money."³⁷⁶ Lastly, in a political *coup de grace*, in January 1834 he revoked the Bank's authority to serve as the federal government's agent in paying pensions to Revolutionary War veterans and directed Secretary of War Lewis Cass to recover the funds and accounts relating to those pensions. When Biddle refused, Jackson suspended the pension payments altogether and referred the matter to Congress, complaining that the Bank "not only defied the government but inflicted needless misery on the nation's patriotic heroes."³⁷⁷ The public, unable to believe that "Jackson, the Hero of the War of 1812, would withhold funds from veterans," proceeded to blame the entire matter on Biddle.³⁷⁸

By mid-February of 1834, public opinion had turned on the Bank.³⁷⁹ The Governor of Pennsylvania, previously a strong bank supporter, condemned Biddle in his annual message to the state legislature.³⁸⁰ With the chief executive of the Bank's home state openly opposed to the Bank, Pennsylvania's congressional delegation and officials in other states quickly followed suit.³⁸¹ Buoyed by the turn in public opinion, the House Democrats finally closed off debate on the removal of deposits by a scant four votes.³⁸² Taney's report was referred to the Ways and Means Committee, which subsequently returned a report blaming Biddle for precipitating the Panic.³⁸³ The House then promptly passed resolutions declaring (1) that the Bank ought not to be rechartered, (2) that the deposits ought not to be restored, (3) that state banks ought to be

376. REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 114.

377. Andrew Jackson, Message to the Senate and House of Representatives (Feb. 4, 1834), in 3 MESSAGES & PAPERS, *supra* note 177, at 1258.

378. See REMINI, *BANK WAR*, *supra* note 266, at 160; see also CATTERALL, *supra* note 303, at 305-07; ; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 130-31; SMITH, *ECONOMIC ASPECTS*, *supra* note 302, at 168.

379. See CATTERALL, *supra* note 303, at 348; REMINI, *BANK WAR*, *supra* note 266, at 163; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 164; VAN DEUSEN, *supra* note 330, at 283.

380. See BOWERS, *supra* note 312, at 318, 329; CATTERALL, *supra* note 303, at 339-40; GOVAN, *supra* note 303, at 257; JAMES, *supra* note 312, at 672; REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 164.

381. See CATTERALL, *supra* note 303, at 339-40; JAMES, *supra* note 312, at 672; REMINI, *BANK WAR*, *supra* note 266, at 163-64.

382. See REMINI, *BANK WAR*, *supra* note 266, at 165.

383. See 10 CONG. DEB. app. 156-76 (1834); see also REMINI, *COURSE OF DEMOCRACY*, *supra* note 302, at 166.

continued as federal depositories, and (4) that a special committee should examine the Bank's role in the Panic.³⁸⁴ The House later summarily tabled two Senate resolutions which disapproved of Taney's action and called for the restoration of the deposits to the Bank.³⁸⁵

With the House's actions effectively overriding the previous action in the Senate, the Bank was doomed. Biddle quickened the end by refusing to allow the House investigators to examine the Bank's books or correspondence and refusing to testify before Congress.³⁸⁶ Although Biddle attempted to save face by requesting an alternate investigation by the more Bank-friendly Senate, the Senate Finance Committee's report approving of the Bank's actions in refusing to cooperate with the House's investigation was filed after the congressional elections and thus was too late to have any effect politically.³⁸⁷

The following year, Senator Calhoun reported a bill to limit the President's removal power, the third section of which provided:

[I]n all nominations made by the President to the Senate, to fill vacancies occasioned by the exercise of the President's power to remove . . . the fact of the removal shall be stated to the Senate, at the same time that the nomination is made, with a statement of the reasons for which such officer may have been removed.³⁸⁸

The ensuing debate was a more measured and reasoned discussion of the removal power than was possible the previous session, when all positions taken on the removal power were offered in the political shadow of the great Bank War.³⁸⁹ Calhoun's bill passed the

384. See CATTERALL, *supra* note 303, at 341-42; GOVAN, *supra* note 303, at 266; LATNER, *supra* note 302, at 184; REMINI, BANK WAR, *supra* note 266, at 165-66; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 166-67; VAN DEUSEN, *supra* note 330, at 283.

385. See REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 167; VAN DEUSEN, *supra* note 330, at 284.

386. See JAMES, *supra* note 312, at 675; REMINI, BANK WAR, *supra* note 266, at 167; REMINI, COURSE OF DEMOCRACY, *supra* note 302, at 167.

387. See CATTERALL, *supra* note 303, at 306, 356-58; REMINI, BANK WAR, *supra* note 266, at 168.

388. S. DOC. NO. 109, 23d Cong., 2d Sess. (1835), reprinted in 11 CONG. DEB. app. 219-31 (1835); see also *id.* at 468 (statement of Sen. Webster) (quoting the bill); SMITH, CIVIL SERVICE, *supra* note 292, at 4.

389. As Clay pointed out, it was "extremely fortunate that this subject of executive patronage came up, at this session, unencumbered by any collateral question," unlike in the previous session when "[t]he bank mingled itself in all our discussions." 11 CONG.

Senate on February 21, 1835, by a vote of thirty-one to sixteen.³⁹⁰ House Speaker John Quincy Adams had prepared a long speech opposing Calhoun's bill. However, he never got the chance to deliver it, as the bill was never considered by the House and died. The Senate exacted some measure of revenge by indefinitely postponing action on his nomination to the Supreme Court, but confirmed Taney as Chief Justice the following year.³⁹¹ Finally, on January 16, 1837, the Senate erased the last vestige of its opposition to the President's power to remove, expunging the resolution censuring Jackson for his actions from its Senate Journal.³⁹² In discussing this vote, Leonard White writes:

Jackson earned a personal triumph, and thus symbolically his reading of executive powers gained political confirmation. "Never before and never since," wrote Corwin, "has the Senate so abased itself before a President."³⁹³

Thus, Jackson's victory over the Senate was made complete.

The Senate triumvirate of Clay, Calhoun, and Webster, each driven by presidential ambition, proved far more unified in criticizing Jackson than in supporting the Bank. In considering Webster's bill to recharter the bank, the three splintered over the length of the recharter term, and in the end, the recharter failed.³⁹⁴ The Bank obtained a charter from Pennsylvania to keep its Philadelphia branch alive when its federal charter expired in 1836, but this extension was to be short lived. The Bank ignominiously collapsed in 1841, the victim of wild speculation and fiscal mismanagement.³⁹⁵ In the final analysis, even critics of unitary executive theory have been forced to concede that Jackson's removal of Duane represents a monument to the development of the unitary

DEB. 513 (1835).

390. *See id.* at 576.

391. *See* REHNQUIST, *supra* note 302, at 255.

392. *See* 13 CONG. DEB. 504-05 (1837) (passing expungement resolution by a vote of 24 to 19); *see also* REMINI, *BANK WAR*, *supra* note 266, at 174; LOUIS FISHER, *PRESIDENTIAL SPENDING POWER* 16 (1975); VAN DEUSEN, *supra* note 330, at 285.

393. WHITE, *THE JACKSONIANS*, *supra* note 262, at 44 (citing CORWIN, *THE PRESIDENT* (1940 ed.), *supra* note 20, at 267).

394. Webster offered a compromise recharter term of six years, but Clay, obstinately refusing to concede anything to Jackson, declined to support anything but a full twenty-year term, while Calhoun favored 12. *See* BOWERS, *supra* note 312, at 332-35; CATTERALL, *supra* note 303, at 336-38; GOVAN, *supra* note 303, at 265-66; REMINI, *BANK WAR*, *supra* note 266, at 165.

395. *See* REMINI, *BANK WAR*, *supra* note 266, at 174.

executive.³⁹⁶ Jackson's unflagging advocacy of the President's power to supervise federal administration and to remove executive officials invalidates any suggestion that the executive branch acquiesced to any congressional interference with executive functions.

IV. CONCLUSION

When the first half-century of presidential practice under the Constitution is viewed as a whole, it is crystal clear that the first seven Presidents did not by their words or their deeds undermine the unitary executive structure created in Philadelphia in 1787. No reasonable Burkean common law constitutionalist could describe the whole of the presidential practice between 1789 and 1837 as constituting a long-standing, consistent presidential acquiescence to congressional efforts to limit the unitariness of the executive. Even the Virginia dynasty of Presidents, whose constitutional views favored a weak chief executive,³⁹⁷ consistently opposed such congressional incursions. And as Jackson's successful removal of Treasury Secretary Duane demonstrated, no one could doubt the President's constitutional power to control the *entire* executive branch (including the Treasury Department) and the actions of *all* of his subordinates.

Perhaps the clearest proof of this point comes from the writings of the most eminent constitutional commentators of that era, James Kent and Joseph Story, who clearly did not believe that the President had so acquiesced; in fact, if any established practice existed, they thought it indicated Congress's *inability* to fragment the unitary executive. Kent claimed that the Decision of 1789 "amounted to a legislative construction of the constitution, and it has ever since been acquiesced in and acted upon, as of decisive authority in the case."³⁹⁸ Kent further noted:

It is supported by the weighty reason, that the subordinate officers in the executive department ought to hold at the pleasure of the head of that department, because he is invested generally with the executive authority, and every participation in that authority by the Senate was an exception to a general principle, and ought to be taken strictly. The President is the great responsible officer for the faith-

396. See Lessig & Sunstein, *supra* note 6, at 78-83.

397. See REHNQUIST, *supra* note 302, at 252.

398. 1 KENT, *supra* note 1, at 310.

ful execution of the law, and the power of removal was incidental to that duty, and might often be requisite to fulfill it.

This question has never been made the subject of judicial discussion; and the construction given to the Constitution in 1789 has continued to rest on this loose, incidental declaratory opinion of Congress, and the sense and practice of government since that time. *It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the Construction.*³⁹⁹

Kent offered a similar observation in a letter to Daniel Webster: "I heard the question debated in the summer of 1789, and Madison, Benson, Ames, Lawrence, etc., were in favor of the right of removal by the President, and such has been the opinion ever since, and the practice." Although Kent generally agreed with the views Hamilton expressed in *The Federalist No. 77*, he nonetheless concluded:

[I]t is too late to call the President's power in question after a declaratory act of Congress and *an acquiescence of half a century*. We should hurt the reputation of our government with the world, and we are accused already of the Republican tendency of reducing all executive power into the legislative, and making Congress a national convention. That the President grossly abuses the power of removal is manifest, but it is the evil genius of Democracy to be the sport of factions.⁴⁰⁰

Likewise, Joseph Story, although critical of the Decision of 1789's outcome, conceded the fact that Congress had acquiesced and indicated that constitutionally unlimited presidential removal power should be regarded as a settled constitutional point:

The public . . . acquiesced in this decision, and it constitutes, perhaps the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions.

399. *Id.* (emphasis added).

400. Letter from James Kent to Daniel Webster (Jan. 21, 1830) (emphasis added), in 1 THE PRIVATE CORRESPONDENCE OF DANIEL WEBSTER 486, 487 (Fletcher Webster ed., 1857), quoted in *Myers v. United States*, 272 U.S. 52 (1926).

Even the most jealous advocates of state rights seem to have slumbered over this vast reach of authority, and have left it untouched. . . .

. . . . If there has been any aberration from the true constitutional exposition of the power of removal [during the Andrew Jackson Administration] (which the reader must decide for himself,) *it will be difficult, and perhaps impracticable, after forty years experience, to recall the practice to the correct theory.*⁴⁰¹

Story's and Kent's views in this respect were also held, as we have seen, by James Madison and Daniel Webster, both of whom thought that settled practice had conferred the removal power on the President. All four of these early and justly famous constitutional commentators *reject* the Lessig and Sunstein argument about our early constitutional practices.

Although Kent's and Story's observations were limited to the removal power, it is just as clear that the early Presidents of the Republic vigorously exercised their right to direct and review the actions of their subordinates. Although some (but not all) opinions of Attorney General Wirt suggest otherwise, Presidents throughout this period often exerted their control over the execution of the laws and did not hesitate to direct lower-level executive officials. And in the end, Wirt's views were subsequently disavowed during the Jackson Administration. Thus, the first half-century of presidential practice under the Constitution provides little support for the claim that *any President* accepted *any* limitations whatsoever on the law execution power, including with respect to the Treasury Department. On the contrary, the vigor with which the first seven Presidents defended that power suggests, if anything, a fifty year founding tradition of constitutionally mandated presidential control over the executive branch.

401. 2 STORY, *supra* note 2, Section 1543-44; *see also* 2 HAYNES, *supra* note 155, at 791 n.2.